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### Extraordinary Ability and the English Premier League: The Immigration, Adjudication, and Place of Alien Athletes in American and English Society

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## EXTRAORDINARY ABILITY AND THE ENGLISH PREMIER LEAGUE: THE IMMIGRATION, ADJUDICATION, AND PLACE OF ALIEN ATHLETES IN AMERICAN AND ENGLISH SOCIETY

### I. INTRODUCTION

Imagine playing the role of general manager for a professional soccer team. As the world's game, professional-caliber soccer players abound. After extensive scouting and preparation, four "soccer prospects" appear worthwhile to join the squad: a twenty-two-year-old forward who played magnificently at the World Cup, scored two huge goals at the FIFA World Youth Championship, won Best Newcomer award in his prior league, and earned nineteen caps;<sup>1</sup> a twenty-four-year-old midfielder who also received acclaim at the World Cup, performed solidly in his prior league by winning two state titles and one national title, and earned fifteen caps; a twenty-four-year-old goalkeeper who had been on his country's Olympic team, won league Goalkeeper of the Year, was a two-time all-star, and earned six caps; and a twenty-year-old midfielder who had been the youngest player acquired by his league, garnered Young Athlete of the Year and Top 100 Rising Stars in the World honors, captained the Under-20 national team at the World Youth Championships, and earned sixteen caps.

Selecting one, or perhaps more, of the "soccer prospects" is not simply a choice of which player has the most talent. For instance, if any of the "soccer prospects" are aliens, selection must be made mindful of league restrictions on foreign players, restricting both the number of alien athletes a team can carry, as well as which specific players a team can carry. If the team were a member of Major League Soccer ("MLS") in the United States, the team could carry up to three "international" players on its active roster, which the governing body of U.S. soccer, U.S. Soccer, has defined in the negative.<sup>2</sup> If the team were a member of the

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<sup>1</sup> For purposes of this Note, a "cap" is an appearance with a country's national team in an international match that satisfies the "A" matches criteria of the United Kingdom; although, in general, a "cap" is merely any appearance with the national team in an international match. See *infra* note 138 and accompanying text (explaining the significance of "A" matches).

<sup>2</sup> About MLS Rules & Regulations, available at <http://www.mlsnet.com/MLS/about/league.jsp?section=regulations&content=overview> (last visited Oct. 4, 2004). A player is international unless: "The player is a United States citizen. The player is in the United

## 542 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

English Premier League ("EPL") in the United Kingdom, the team could carry up to three foreign players and two more players who had played in the country for an uninterrupted period of five years, called the "3 + 2" Rule, according to the governing body of European soccer, the Union of European Football Associations ("UEFA").<sup>3</sup>

In both the United States and United Kingdom, immigration controls for the "soccer prospects," and athletes in general, extend beyond league control. Both countries regulate international player movement through national legislation aimed specifically at professional athletes.<sup>4</sup> Under these systems, any of the four "soccer prospects" mentioned above could be denied admission into the United States or United Kingdom despite the existence of contracts with a team. In many regards, the immigration regulations that these "soccer prospects" must satisfy to qualify for admission into the United States or United Kingdom represent a microcosm of how the United States and United Kingdom use immigration legislation to regulate the flow of aliens into each country, sometimes to protect an industry or a labor-market, and other times merely to discriminate amongst aliens. The government creates criteria that administrative officials implement in determining whether particular candidates satisfy the requirements for admission.

Both the United States and United Kingdom have similar immigration systems, as well as immigration legal histories.<sup>5</sup> Historically, both states enjoyed significant periods without any immigration controls, and the first attempts at immigration regulation stemmed from fear of social, racial, and economic dilution.<sup>6</sup> In an effort

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States as a resident alien (green card) or under asylum protection, regardless of eligibility to play for the U.S. National Team." *Id.*

<sup>3</sup> Rachel B. Arnedt, *European Union Law and Football Nationality Restrictions: The Economics and Politics of the Bosman Decision*, 12 EMORY INT'L L. REV. 1091, 1104 (1998).

<sup>4</sup> See *infra* Parts II.B, III.C.

<sup>5</sup> See *infra* Parts II, III (discussing the immigration systems of the United States and United Kingdom); *infra* note 6.

<sup>6</sup> As an international power and small island, immigration controls remained historically absent in the United Kingdom for about one thousand years. Ann Dummett, *Immigration and Nationality*, in *INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN* 335, 336 (Christopher McCrudden & Gerald Chambers eds., 1994). In fact, the Victorian era saw complete, legally uncontrolled immigration. *Id.* Not until the beginning of the twentieth century did immigration legislation actually become part of U.K. law. See, e.g., Aliens Act 1905, 5 Edw. 7, ch. 13 (Eng.) (stifling the large influx of East European Jews, among other "undesirables," such as the Chinese and gypsies, flooding the United Kingdom during the late 1800s); Aliens Restriction Act, 1914, 4 & 5 Geo. 5, c. 12 (Eng.) & Defence of the Realm Acts, 1914, 4 & 5 Geo. 5, c. 29 (Eng.) (empowering the Home Secretary with control over all aliens and suspending the right of appeal for all aliens); Aliens Restriction (Amendment)

Act, 1919, 9 & 10 Geo. 5, c. 92 (Eng.) (abolishing the immigration judicial review granted under the Aliens Act 1905, while universally subjecting aliens to immigration regulation); and Commonwealth Immigration Act, 1962, 10 & 11 Eliz. 2, c. 21 (expanding Indian immigration by introducing a work-voucher system that saw work-voucher applications rise to three hundred thousand despite only approximately thirty-thousand available annually); Dummett, *supra*, at 336-40; Randall Hansen, *From Subjects to Citizens: Immigration and Nationality Law in the United Kingdom*, in TOWARDS A EUROPEAN NATIONALITY 69, 73 (Randall Hansen & Patrick Weil eds., 2001); IAN A. MACDONALD, IMMIGRATION LAW AND PRACTICE IN THE UNITED KINGDOM 183 (1983).

The first surviving attempt at centralized, federal immigration regulation did not occur until the passage of the Immigration Act of 1875. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798-1965, 308-09 (1981); Act of March 3, 1875, ch. 141, 18 Stat. 477; *see, e.g.*, status-based immigration regulations from the Act of March 3, 1875, ch. 141, 18 Stat. 477 (1875) (banning women, specifically Chinese women, engaged in prostitution and the Coolie Trade of Chinese slave laborers); Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882) (banning all Chinese laborers from immigration for a period of ten years); Immigration Act of August 3, 1882, ch. 376, 22 Stat. 214 (1882) (prohibiting any person likely to become a public charge); Act of February 26, 1885, ch. 164, 23 Stat. 332 (1885) (making it unlawful for the immigration of any person under contract, or promise of contract, for labor or services); Immigration Act of March 3, 1891, ch. 551, 26 Stat. 1084 (1891) (restricting the admission of felons, the diseased, paupers, and polygamists); Immigration Act of March 3, 1903, Pub. L. No. 57-162, 32 Stat. 1213 (1903) (excluding anarchists and anyone who believed in or advocated the overthrow of the government); Immigration Act of February 20, 1907, 34 Stat. 898 (1907) (barring admission to imbeciles, feeble-minded persons, mentally and physically handicapped, unaccompanied children, criminals of moral turpitude, and women with immoral purposes); Immigration Act of February 5, 1917, ch. 29, 39 Stat. 874 (1917) (excluding immigrants for mental health reasons, creating a "barred zone" of aliens for the Asia-Pacific region, and invoking a literacy test for all immigrants); Quota Law of May 19, 1921, ch. 8, 42 Stat. 5 (1921) (limiting the number of aliens to three percent annually of the foreign-born persons of that nationality who lived in the United States according to the census of 1910, but exempting actors, artists, lecturers, singers, nurses, ministers, professors, any learned professionals, and domestic servants); Act of May 26, 1924, ch. 190, 43 Stat. 153 (1924) (creating the national origins quota system which mandated immigration visas for both quota and non-quota immigrants); *see also*, Louis Anthes, *The Island of Duty: The Practice of Immigration Law on Ellis Island*, 24 N.Y.U. REV. L. & SOC. CHANGE 563 (1998); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1 (2000); Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002); Michael J. Churgin, *Immigration Internal Decisionmaking: A View from History*, 78 TEX. L. REV. 1633 (2000); Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63 (2002); Henry B. Hazard, *The Immigration and Nationality Systems of the United States of America*, 14 F.R.D. 105 (1953, 1954); Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997); James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69 (2003); Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625 (2001); Catherine E. Halliday, Note, *Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States' Northern and Southern Borders*, 36 VAL. U. L. REV. 181 (2001); Immigration Information, *Immigration and*

## 544 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

to preserve economies and foster national industries and the employment market, the United States and United Kingdom modernized their immigration legislation and delegated authority to administrative agencies to control and implement the immigration systems.<sup>7</sup> As such, the administrative agencies, specifically those that implement and interpret the immigration regulations, possess all the power and require all the attention when analyzing problems within the immigration system.

This Note will begin with a history of U.S. immigration legislation and the current methods used by U.S. Citizenship and Immigration Services ("USCIS") Directors and administrative law judges ("ALJs") to implement U.S. immigration laws.<sup>8</sup> Part III of this Note will discuss the history of the U.K. work permit system and its role within the United Kingdom and the European Union ("EU").<sup>9</sup> Flaws and disparities from both systems and how the United States can learn from the U.K. system will be analyzed in Part IV.<sup>10</sup> Part V will provide a recommendation for changing the U.S. model by learning from the benefits and drawbacks of the U.K. model.<sup>11</sup> In conclusion, Part VI will address the current condition of immigration controls for athletes and the direction such controls should be headed.<sup>12</sup>

## II. IMMIGRATION

Constitutionally, the federal government has explicit authority over naturalization, but immigration originally fell upon the states to

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*Naturalization Legislation from the Statistical Yearbook*, available at <http://uscis.gov/graphics/shared/aboutus/statistics/legishist/index.htm> (last visited Oct. 4, 2004); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, in *THE JOURNAL OF AMERICAN HISTORY*, June 1999, available at <http://www.historycooperative.org/journals/jah/86.1/ngai.html> (last visited Oct. 4, 2004).

<sup>7</sup> See *infra* Parts II.B, III.C.

<sup>8</sup> See *infra* Part II; see also *infra* Part II.B (describing the role of ALJs and Directors). USCIS Directors are the head administrators of each regional immigration center throughout the United States. See *infra* note 35 (discussing the move from the INS to the USCIS). For this Note, any reference to ALJs is a reference to ALJs and USCIS Directors because both perform the same functions within the immigration system of the United States, and many of the problems in the U.S. immigration system are due to the improper implementation of the immigration laws and regulations by both.

<sup>9</sup> See *infra* Part III.

<sup>10</sup> See *infra* Part IV.

<sup>11</sup> See *infra* Part V.

<sup>12</sup> See *infra* Part VI.

regulate.<sup>13</sup> After 1808, but prior to the modern era of codified immigration regulations and the regulation of alien athletes, the United States established qualitative and quantitative immigration systems out of the isolationism and nativism that resulted from depression and war.<sup>14</sup> Not until 1952 did the United States codify all immigration regulation into one system.<sup>15</sup> To further accommodate alien athletes, amendments to the U.S. immigration system occurred in 1990, which created athlete specific categories for immigration, and resulted in litigation to determine which athletes actually satisfied the statutory and regulatory criteria.<sup>16</sup>

A. *Codification of Immigration Regulation – The Immigration and Nationality Act*

Subsequent to the qualitative and quantitative immigration systems of the late 1800s and early 1900s, the McCarthy Era spawned a new immigration system, the Immigration and Nationality Act of 1952 (“INA”),<sup>17</sup> which codified all previous immigration legislation with the goal of protecting the American labor market.<sup>18</sup> The INA significantly

<sup>13</sup> Article I of the Constitution states: “Congress shall have power . . . to establish a uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 4. Article I also states:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

*Id.* § 9, cl. 1.

<sup>14</sup> “Qualitative” immigration legislation means restricting immigrants on the basis of personal characteristics, such as race, gender, physical and mental conditions, profession, and economic standing. See HUTCHINSON, *supra* note 6, at 405; Developments in the Law – Immigration Policy and the Rights of Aliens, IV. *Admission and Exclusion of Immigrants Under the Immigration and Nationality Act*, 96 HARV. L. REV. 1334, 1339-52 (1983) (defining qualitative); see *supra* note 6 (describing the qualitative regulations based on fear of social and economic dilution). “Quantitative” immigration legislation means restricting aliens through quota systems. See HUTCHINSON, *supra* note 6, at 461; Developments in the Law – Immigration Policy and the Rights of Aliens, *supra*, at 1336-39 (defining quantitative); see *supra* note 6 (describing the quantitative regulations based on fear of social and economic dilution).

<sup>15</sup> See *infra* Part II.A.

<sup>16</sup> See *infra* Part II.B.

<sup>17</sup> Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) [hereinafter INA].

<sup>18</sup> Alfred J. Del Rey, Jr., *U.S. Immigration Procedures and the Employment of Alien Performers and Sports Personalities*, 1 COPYRIGHT ENT. AND SPORTS L. 119, 121 (1982); see Developments in the Law – Immigration Policy and the Rights of Aliens, *supra* note 14; John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988).

546 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

altered immigration legislation, and the resulting system appeared to stabilize immigration policy while maintaining qualitative and quantitative restrictions.<sup>19</sup>

The INA also made significant changes in the treatment of professional athletes, specifically helping to remedy the difficulty in maintaining stable employment and attesting certification.<sup>20</sup> INA Sections 203(a)(3)<sup>21</sup> (immigrant) and 101(a)(15)(H)<sup>22</sup> (nonimmigrant)

<sup>19</sup> HUTCHINSON, *supra* note 6, at 308-09. The most significant new provisions actually decreased the number of immigrants allotted to enter the United States, but also delineated with greater clarity the procedures of immigration and naturalization. *Id.* The most significant provisions of the INA included:

1. Change of the formula for computation of the annual quota of any country to one-sixth of 1 percent of the number of persons of that national origin in the United States in 1920 as computed for the 1924 Act . . . [section 201a] . . .
2. Removal of racial[, gender, and marriage] barriers to naturalization, and thereby to immigration [section 311] . . .
- [3]. Revision of the quota preference structure . . . to . . . four preference classes . . . (section 203a).
- [4. Repeal of] the ban on contract labor . . . but [the addition of] other qualitative exclusions [section 212a].

*Id.*; Immigration and Nationality Act of June 27, 1952 (INA) (66 Statutes-at-Large 163), available at <http://uscis.gov/graphics/shared/aboutus/statistics/legishist/511.htm> (last visited Oct. 4, 2004); see *supra* note 6 and accompanying text (explaining the 1924 Act). The 25% preference for the fourth class was changed to 50% in 1959. Act of September 22, 1959, 73 Stat. 644 § 2 (1959).

<sup>20</sup> These changes were the result of two essential amendments to the INA. Act of October 24, 1962, 76 Stat. 1247 (1962), available at <http://uscis.gov/graphics/shared/aboutus/statistics/legishist/524.htm> (last visited Oct. 4, 2004) (granting aliens with special occupational skills first preference nonquota status); Act of April 7, 1970, 84 Stat. 116 (1970), available at <http://uscis.gov/graphics/shared/aboutus/statistics/legishist/533.htm> (last visited Oct. 4, 2004) (allowing aliens of distinguished merit and ability to enter under the H1 temporary, nonimmigrant worker class). The importance of the 1970 Amendment for athletes stemmed from the removal of the temporary requirement for work that the INA had required originally. Act of April 7, 1970, 84 Stat. 116 (1970), available at <http://uscis.gov/graphics/shared/aboutus/statistics/legishist/533.htm> (last visited Oct. 4, 2004); see also Del Rey, Jr., *supra* note 18, at 121. This essentially meant that any alien who intended to remain only temporarily in the United States could still obtain a permanent employment position, which meant athletes would not have to return to their state of origin after each season expired. Del Rey, Jr., *supra* note 18, at 122. Because athletic ability is not a readily gauged ability, nor an easily duplicated one, attesting certification is near impossible. *Id.* at 119.

<sup>21</sup> INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (1988). Section 203(a)(3) states:

Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in § 1151(a), to qualified immigrants . . . who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural

recognized athletes as admissible aliens where their careers verified possession of, respectively, “exceptional ability in the arts and sciences,”<sup>23</sup> or “distinguished merit and ability.”<sup>24</sup> Despite similarly vague statutory language, “exceptional ability” denoted a higher standard than “distinguished merit and ability” through interpretations made at the administrative and federal levels.<sup>25</sup> The statutory language of Section 203(a)(3) made no mention of athletes, only “arts” and “sciences,” and this language also had no statutory definition.<sup>26</sup> Therefore, immigration courts liberally applied the generic definition of “arts” to categorize athletes under “arts.”<sup>27</sup> Additionally, while Section 101(a)(15)(H) did not specifically address athletes, the USCIS annually placed athletes among those occupations admissible as temporary workers.<sup>28</sup>

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interest, or welfare of the United States, and whose services . . . are sought by an employer in the United States.

*Id.* § 203(a)(3), § 1153(a)(3).

<sup>22</sup> INA § 101(a)(15)(H)(i), 8 U.S.C.A. § 1101(a)(15)(H)(i) (Supp. 2004). Aliens who had “distinguished merit and ability . . . coming temporarily to the United States to perform services of an exceptional nature requiring merit and ability.” *Id.* § 101(a)(15)(H)(i), § 1101(a)(15)(H)(i).

<sup>23</sup> INA § 203(a)(3), 8 U.S.C. § 1153(a)(3); *see supra* note 21.

<sup>24</sup> INA § 101(a)(15)(H)(i), 8 U.S.C. § 1101(a)(15)(H)(i); *see supra* note 22.

<sup>25</sup> *See Lee v. INS*, 407 F.2d 1110, 1113 (9th Cir. 1969) (holding that Congress would not have made the two standards synonymous, or else the H-1 category could be used as a loophole for immigrants to enter the country under less evidence); *Hess v. Esperdy*, 234 F. Supp. 909, 912 (S.D.N.Y. 1964) (holding temporary workers’ employers need not show a need for the worker beyond the temporary work period to satisfy the requirements for a visa); *Matter of Kim*, 12 I. & N. Dec. 758, 761 (Reg. Comm’r. 1967) (holding that exceptional ability contemplates prominence in one’s field, whereas distinguished merit and ability only contemplates a “specific, limited act or ability which is a limited part of the whole field”); *see also Del Rey, Jr.*, *supra* note 18, at 120-21; John A. Glenn, Annotation, *Construction and Application of § 203(A)(3) of Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1153(A)(3)) as Amended Giving Preference Visas to Professionals or Persons Having Ability in Arts and Sciences*, 18 A.L.R. Fed. 287, 354-55 (1974).

<sup>26</sup> *Matter of Tagawa*, 13 I. & N. Dec. 13, 13 (Dist. Dir. 1967); *see Del Rey, Jr.*, *supra* note 18, at 126-27.

<sup>27</sup> Art has been defined by immigration courts as relating “to something to be done, [whereas] science [is] something to be known . . . . Art in the highest sense, transcends all rule. Science does not, like mechanic arts, make production its direct aim, yet its possible productive application is a constant stimulus to scientific investigation.” *Matter of Tagawa*, 13 I. & N. Dec. at 14. *Matter of Masters* silenced any apprehension to the findings of *Matter of Tagawa* when it found athletics as a form of entertainment, and, therefore, within the definition of art for § 203(a)(3) purposes. 13 I. & N. 125 (D.D. 1969); *see also Del Rey, Jr.*, *supra* note 18, at 126-27.

<sup>28</sup> O.I. 214.2(h)(2); *see Del Rey, Jr.*, *supra* note 18, at 122. “O.I.” stands for Operation Instructions, which are supplemental clarifications created by the Department of Homeland Security (“DHS”) to accompany the INA and the regulations to help with procedural interpretation of certain aspects of the immigration system, although the O.I.s



## 548 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

Despite the apparent attempt to grant greater access to professional athletes, the INA restricted movement of aliens into the United States. An alien athlete seeking nonimmigrant status as a temporary worker could obtain an H-1 visa if the athlete could prove "distinguished merit and ability," or an H-2 visa if the athlete had come to the United States for work in which no unemployed American workers were available.<sup>29</sup> Both forms of temporary visas carried significant flaws. H-2 applicants dealt with a difficult burden of proof: no available Americans for the service.<sup>30</sup> H-1 applicants had to meet the subjective qualifications of a "high level of achievement shown by 'prominence' in the performer's field, as demonstrated by sustained national or international acclaim."<sup>31</sup> Although providing ALJs with a rubric to administer, the INA standards of "exceptional ability" and "distinguished merit and ability," as applied by ALJs, failed to provide definitive standards by which athletes, or those representing their interests, could speculate the viability of admission.<sup>32</sup>

*B. Immigration of Professional Athletes*

In an attempt to curb the confusion caused by ALJ determinations, Congress passed the Immigration Act of 1990, amending numerous portions of the INA.<sup>33</sup> The Immigration Act of 1990 created a series of

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are not published with the regulations and the government has slowly moved away from using O.I.s altogether. Operations Instructions, available at <http://uscis.gov/graphics/lawsregs/instruc.htm> (last visited Oct. 4, 2004).

<sup>29</sup> INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(1) (Supp. I 1989); see also Thomas R. Dominczyk, Comment, *The New Melting Pot: As American Attitudes Toward Foreigners Continue to Decline, Athletes Are Welcomed with Open Arms*, 8 SETON HALL J. OF SPORT L. 165, 169 (1998); Jon Jordan, Comment, *The Growing Entertainment and Sports Industries Internationally: New Immigration Laws Provide for Foreign Athletes and Entertainers*, 12 U. MIAMI ENT. & SPORTS L. REV. 207, 209-10 (1994).

<sup>30</sup> INA § 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (Supp. I 1989); Dominczyk, *supra* note 29, at 169; Jordan, *supra* note 29, at 210-11; Mark W. Peters, Note, *Much Ado About Anything? The Effect of the Immigration Act of 1990 and Subsequent Amendments on Nonimmigrant Alien Artists and Entertainers*, 38 WAYNE L. REV. 1661, 1666-67 (1992); Amy E. Worden, Comment, *Gaining Entry: The New O and P Categories for Nonimmigrant Alien Athletes*, 9 MARQ. SPORTS L.J. 467, 469-70 (1999).

<sup>31</sup> INA § 101(a)(15)(H)(i), 8 U.S.C. § 1101(a)(15)(H)(i) (Supp. I 1989); Dominczyk, *supra* note 29, at 169; Jordan, *supra* note 29, at 209-10; Peters, *supra* note 30, at 1664-65; Worden, *supra* note 30, at 469.

<sup>32</sup> See Miguel Lawson & Marianne Grin, Recent Development, *The Immigration Act of 1990*, Pub. L. No. 101-649, 104 Stat. 4978, 33 HARV. INT'L L.J. 255 (1992); Michael D. Patrick, *Working Visas for Athletes and Entertainers*, N.Y. L.J., March 28, 1994, at 3; Jordan, *supra* note 29, at 213.

<sup>33</sup> Immigration Act of November 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); see also Lawson & Grin, *supra* note 32.

nonimmigrant visas by which alien athletes could enter the United States temporarily.<sup>34</sup> Additionally, the Immigration Act of 1990 revamped the INA's employment-based immigration system to include five categories aimed primarily at satisfying needs within certain labor markets, while giving priority to certain professionals and other highly skilled workers, such as alien athletes.<sup>35</sup>

### 1. Nonimmigrant Visas

Professional athletes, which can include coaches and other support personnel, who do not intend on permanently staying in the United States, may obtain four types of nonimmigrant visas under the Immigration Act of 1990, with the differences in applicability resting essentially on the sport and the ability of the athlete.<sup>36</sup> Similar to the immigration statutes of the 1800s, the Immigration Act of 1990, coupled with appropriate regulations in the Code of Federal Regulations

<sup>34</sup> INA § 214, 8 U.S.C.A. § 1184 (Supp. 2004); *see infra* Part II.B.1 (discussing the several nonimmigrant visas).

<sup>35</sup> INA § 203, 8 U.S.C. § 1153 (1988); *see supra* notes 6, 19-20 and accompanying text (discussing the creation of the quota and preference system of the INA); *infra* Part II.B.2 (providing a list and explanation of the employment-based immigrant visas); *see also* U.S. Commission on Immigration Reform, U.S. Immigration Policy: Restoring Credibility (Executive Summary) 33 (1994); Herbert A. Wiess, *Employment-Based Immigrant Visa Petitions: An Update*, IMMIG. BRIEFINGS, June 1996, at 1. On November 25, 2002, President George W. Bush signed the Homeland Security Act, which introduced a complete overhaul of immigration, mainly the abolition of the INS and creation of the DHS and the USCIS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). Although an intricate and pervasive amendment to the immigration services and policies of the United States, the Homeland Security Act did not alter the application, appeals, and judicial review processes available to alien athletes, nor did it create or abolish any visa categories of relevance to this Note. As such, reference to the USCIS instead of the INS is more appropriate for this Note. The reader must be aware, however, that any mention of INS precedent or administrative functioning presently means USCIS, whereas any historical fact predating July 2003 implicates INS activities that the USCIS adopted as its own as of July 2003.

<sup>36</sup> INA § 212(a)(5)(A)(iii)(II), 8 U.S.C.A. § 1182(a)(5)(A)(iii)(II) (Supp. 2004). The INA defines "professional athlete" as an athlete employed by:

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

*Id.* § 212(a)(5)(A)(iii)(II), § 1182(A)(5)(A)(iii)(II); *see infra* Part II.B.1 (explaining the different categories of nonimmigrant visas).

## 550 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

("CFR"), awards almost all types of nonimmigrant visas based on qualitative factors as applied by ALJs.<sup>37</sup>

For nonimmigrant visas, the application and denial processes allow numerous opportunities for review.<sup>38</sup> When an alien athlete files a nonimmigrant visa petition, the petition must first pass the discretion of a USCIS Director ("Director"), and if the Director intends to deny the petition on evidentiary grounds, the applicant will receive notice of this intent in order to rebut the evidence already provided by the applicant.<sup>39</sup> Applicants may only provide evidence available at the time of filing their petition, and the burden of proof rests upon the petitioner at every stage.<sup>40</sup> Any evidence offered must be proved, and mere assertions by counsel will not constitute evidence.<sup>41</sup> If new evidence does not sway the Director, the applicant will receive notice of denial with the Director's reasoning, as well as notice of the right to appeal to the Associate Commissioner for Examinations.<sup>42</sup> Either the USCIS or the applicant may further appeal the decision of the Administrative Appeals Unit ("AAU")<sup>43</sup> to the federal circuit seeking injunctive and declaratory relief, in which the court will review the denial of a visa petition under an abuse of discretion standard.<sup>44</sup>

<sup>37</sup> Only the H-2B nonimmigrant visa follows a qualitative quota system. INA § 101(a)(15)(H)(ii)(b), 8 U.S.C.A. § 1101(a)(15)(H)(ii)(b) (Supp. 2004); *see also* O.I. 214.2(h)(7)(vii)(D); *supra* notes 6, 14 and accompanying text (discussing qualitative immigration controls); *infra* notes 49, 53, 67, 92 (providing the list of criteria used by ALJs).

<sup>38</sup> INA § 291, 8 U.S.C.A. § 1361 (Supp. 2004). The preliminary burden of proof for all aliens is defined as establishing eligibility to receive such a visa or establishing not inadmissible under any provision of the INA and that the alien is entitled to the status claimed. *Id.* § 291, § 1361; *see also* 8 C.F.R. §§ 214.2(b), (h), (o), (p) (2004) (delineating the appeals available to applicants of each visa). As seen in the C.F.R., B visas do not have the potential to be reviewed, and thus have been removed from the list of nonimmigrant visas for appeals purposes. 8 C.F.R. § 214.2(b).

<sup>39</sup> 8 C.F.R. §§ 214.2(h)(10)(ii), (o)(7)(i), (p)(9)(i).

<sup>40</sup> INA § 291, 8 U.S.C.A. § 1361. The preliminary burden of proof for all aliens is defined as establishing eligibility to receive such a visa or establishing not inadmissible under any provision of the INA and that the alien is entitled to the status claimed. *Id.* § 291, § 1361; *see* Matter of Izumni, 22 I. & N. Dec. 169 (Comm. 1998); Matter of Katigbak, 14 I. & N. Dec. 45 (Reg. Comm. 1971).

<sup>41</sup> Matter of Obaigbena, 19 I. & N. Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I. & N. Dec. 503, 506 (BIA 1980).

<sup>42</sup> 8 C.F.R. § 214.2(h)(10)(iii), (o)(7)(ii), (p)(9)(ii); 8 C.F.R. § 103.1(f)(3)(iii)(f) (2004).

<sup>43</sup> The AAU is the appellate body of the Associate Commission for Examinations. 8 C.F.R. § 103.3(a)(1)(iv).

<sup>44</sup> 28 U.S.C. §§ 1361, 2201 (2000); *Gonzales v. INS*, 996 F.2d 804, 808 (6th Cir. 1993); *Bal v. Moyer*, 883 F.2d 45, 47 (7th Cir. 1989); *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1264 (7th Cir. 1985); *Occidental Engineering Co. v. INS*, 753 F.2d 766, 797 (9th Cir. 1985); *Grimson v.*

*a. B Visas*

Any of the four “soccer prospects” could attempt to enter the United States as temporary business visitors and obtain a B class visa.<sup>45</sup> However, athletes falling under this category typically participate in single events or short tours that give no salary or remuneration besides prize money, which places MLS prospects outside this visa category.<sup>46</sup> For those athletes who do qualify, the INA requires a B visa applicant to prove that the business undertaken is legitimate and of a professional or commercial character, that the athlete or team holds membership in an international sports league, and that the principal team, or individual athlete, income, and the principal place of business or activity arise from a foreign state.<sup>47</sup>

*b. O Visas*

Because MLS plays seasons spanning several months, the “soccer prospects” could obtain an O visa by proving “extraordinary ability” through sustained national and international acclaim in their specific sport.<sup>48</sup> The difficulty for the “soccer prospects” in receiving an O visa,

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INS, 934 F. Supp. 965, 967 (N.D. Ill. 1996); *Muni v. INS*, 891 F. Supp. 440, 444 (N.D. Ill. 1995). The USCIS abuses its discretion when it acts without rational explanation, that is “when it fails to weigh important factors and to state its reasons for denying relief.” *Vergara-Molina v. INS*, 956 F.2d 682, 685 (7th Cir. 1992). Abuse of discretion may also be found “where the agency’s decision was based on an improper understanding of the law.” *Buletini v. INS*, 860 F. Supp. 1222, 1226 (E.D. Mich. 1994) (citing *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 797 (9th Cir. 1985)).

<sup>45</sup> INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (2000); see also Lawrence P. Lataif, *A Visiting Worker – When Can an Employee B-1?*, IMMIGRATION ADVISOR, Sept. 1996.

<sup>46</sup> B visa athletes consist of golfers, race car drivers, tennis players, jockeys, and sulky drivers. FAM Note 6.4(a) to 22 C.F.R. § 41.31 (2004); 3A IMMIGRATION LAW SERVICE § 52:3 (2003). Amateur athletes also qualify for a B-visa as visitors for pleasure. INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B).

<sup>47</sup> 22 C.F.R. § 41.31(b)(1); O.I. 214.2(b)(13); FAM Note 6.4(b) to 22 C.F.R. § 41.31; 3A IMMIGRATION LAW SERVICE § 52:4 (2003); Lataif, *supra* note 45.

<sup>48</sup> INA § 101(a)(15)(O), 8 U.S.C. § 1101(a)(15)(O); 8 C.F.R. § 214.2(o)(3)(ii)-(iii) (2004). Extraordinary ability is defined as “a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.” 8 C.F.R. § 214.2(o)(3)(ii). An O visa remains valid for up to three years, with the precise duration decided by the USCIS Director. 8 C.F.R. § 214.2(o)(6)(iii)(A). The Immigration Act of 1990 removed the requirement that a temporary worker must possess a residence which he does not intend to abandon. INA § 101(a)(15)(H), 8 U.S.C.A. § 1101(a)(15)(H)(iii) (Supp. 2004); INA § 101(a)(15)(O), 8 U.S.C. § 1101(a)(15)(O) (2000). A later addendum to the Immigration Act of 1990 procedurally mandated athletes to consult with a U.S. peer group or labor organization regarding the athletes’ intended work and qualifications for such work before approval. See Miscellaneous and Technical Immigration and Naturalization Amendments, Pub. L. No. 102-232, 105 Stat. 1733 (1991); 8 C.F.R. § 214.2(o)(5); Larry Carp & Mark Goldman, *Key Entertainment and Sports Law Provisions in the New Immigration Law*, ENT. &

## 552 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

for the most part, lies in showing that the evidentiary standards of “extraordinary ability” outlined in the CFR have been met.<sup>49</sup> This

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SPORTS LAW., Spring 1991, at 9; Laura J. Danielson, *Navigating Difficult Waters: Immigration Laws as Applied to Foreign Artists, Entertainers, and Athletes*, ENT. & SPORTS LAW., Spring 2001, at 3; Frida P. Glucoft & Amy Lynne Pucker, *The O and P Categories for Entertainers, Athletes, Professors, Business Persons and Persons in the Arts*, 486 PLI/LIT 297, 319 (1993); Patrick, *Working Visas for Athletes and Entertainers*, *supra* note 32; Bernard P. Wolsdorf & Mandy Tomson, *Minding Your O's and P's*, L.A. LAW., Apr. 2001, at 47; Matthew N. Greller, Note, *Give Me Your Tired, Your Poor, Your Fastball Pitchers Yearning for Strike Three: How Baseball Diplomacy Can Revitalize Major League Baseball and United States-Cuba Relations*, 14 AM. U. INT'L L. REV. 1647 (1999); Jordan, *supra* note 29; Worden, *supra* note 30. Athletes must consult with a qualified labor organization regarding their sport, typically the league or the players' association, to obtain a favorable advisory opinion that endorses an athlete's ability. Glucoft & Pucker, *supra*, at 319. O visa applicants must also be seeking to enter the U.S. to work in the area of extraordinary ability. INA § 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

<sup>49</sup> 8 C.F.R. § 214.2(o)(3)(iii). Extraordinary ability may be evidenced by:

- (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or
- (B) At least three of the following forms of documentation:
  - (1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
  - (2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
  - (3) Published material in professional or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
  - (4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
  - (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
  - (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
  - (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
  - (8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

*Id.* § 214.2(o)(3)(iii). As protection for some athletes, who in the rare case cannot produce three documents from this list because no such documents would arise from the practice or performance of the event, the athlete may submit other evidence to establish extraordinary ability. *Id.* § 214.2(o)(3)(iii)(C).

difficulty is heightened because ALJs hold a very strict line when determining extraordinary ability, per congressional intent.<sup>50</sup>

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<sup>50</sup> 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991) (stipulating that extraordinary ability visas are intended to be highly restrictive); *see, e.g., In re -*, AAU EAC 02 259 51763 (AAU Feb. 27, 2003) (denying a visa for a soccer coach/trainer for failure to prove extraordinary ability despite evidence that the coach had been trained at the AJAX Institute in Holland; had coached for Italian club AC Venezia's youth team; had earned a degree from the University of Padova; had co-authored a soccer manual; and had been certified as a member of UEFA, because there was no evidence to establish that being a member of UEFA required outstanding achievements of members; the soccer manual, alleged to be the highest selling soccer manual in Italy, had only been asserted by the coach, not proved with supporting evidence; no evidence was given to show that the soccer manual had been published in a professional journal or other major media; and no evidence had been offered to corroborate the assertions that the coach had personally developed the youth program for AC Venezia) [hereinafter *The Italian Soccer Coach*]; *In re -*, AAU EAC 01 201 51154, 2002 WL 32075937 (AAU June 19, 2002) (denying visa to a tennis coach for failure to prove extraordinary ability despite proof that the coach had over seven years of coaching experience; had become a certified tennis pro by the U.S. Professional Tennis Registry ("USPTR"); and had become a certified "tennis tester" by the USPTR, because no evidence had been offered to show the coach had ever been ranked as a professional tennis player; the role of "tennis tester" had not been adequately explained; and the coach had not received labor consultation from the U.S. Tennis Association); *In re -*, AAU EAC 00 049 53121, 2001 WL 34078335 (AAU May 22, 2001) (denying visa to a tennis coach/player for failure to establish being at the very top of professional tennis despite evidence that the coach/player had achieved a level of recognition as a tennis player in India and the USPTR had deemed the coach/player as a tennis teaching professional of extraordinary ability because the coach/player had not submitted evidence of the coach/player's ranking in India; no evidence had been submitted about whether the coach/player had been ranked in international tennis; and the proffered position of youth tennis instructor did not relate to a specific event/events and did not constitute continuing work in an area requiring extraordinary ability); *In re -*, AAU EAC 00 097 51975, 2001 WL 34078299 (AAU Mar. 27, 2001) (denying visa to a cricket player/coach for failure to prove extraordinary ability because evidence of playing cricket as a youth and young adult in India had not been substantiated with explanations of the league or ranking systems for cricket in India; simply showing media clippings of one's participation was not enough to establish sustained acclaim; the consultation letter from the USA Cricket Association did not provide evidence of the player's standing in the sport; and the thirty-five thousand dollar salary offered to the player was not high in comparison to other athletes) [hereinafter *The Cricket Player*]; *In re -*, AAU EAC 00 049 53110, 2001 WL 34078256 (AAU Mar. 7, 2001) (denying visa to a tennis player for failure to prove extraordinary ability despite a record of evidence that included documents showing the player had achieved recognition in India as a youth and university level player; and a letter from the USTA calling the player top ranked because there was no evidence provided to explain the system of ranking or player's ranking in India; the proffered salary of thirty thousand dollars was not a level of income contemplated by the regulations; and the player failed to submit evidence explaining that the player was on a satellite circuit, a sort of minor league, despite the assertions that the satellite level of tennis was a distinct sport altogether) [hereinafter *The Indian Tennis Player*]; *In re -*, AAU WAC 98 111 52438, 1999 WL 33600908 (AAU Apr. 27, 1999) (denying visa to a team sports booster who "perform[ed] antics, cheers, jokes, and activities, herein spirit, to encourage fan participation at major league sporting events" because recognition

c. *P Visas*

The “soccer prospects” could obtain a third nonimmigrant visa, a P visa, in which ALJs admit “internationally recognized” athletes based on their own individual achievements, or those of the team for which they play, to perform services requiring an internationally recognized athlete.<sup>51</sup> P visa applicants, typically coaches, may also file as essential

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in his field of business, “spirit,” had not been shown to be sustained either nationally or internationally); *In re* —, AAU LIN 97 076 50530, 1998 WL 34049101 (AAU Aug. 14, 1998) (denying visa to an assistant golf pro for failure to prove extraordinary ability, despite evidence that the golf pro had a zero handicap, because the golfer had not won any major awards for golf; articles about the golfer were not from professional or general interest publications; and the proposed salary of fourteen hundred dollars a month plus tips and food was not a high salary to garner “substantial remuneration”) [hereinafter *The Golf Pro Assistant*]; *In re* —, AAU LIN 97 176 50369, 1998 WL 34049092 (AAU Aug. 13, 1998) (denying visa to a field hockey consultant coach for failure to establish extraordinary ability because the coach was also a lawyer and thus coaching was only a part-time function; although the coach had recently qualified as a FIH coach, the record failed to explain the qualifications needed to achieve this standard; no media articles were presented to show the coaching prowess of the coach; the proposed salary of two thousand dollars per four sessions was not a high salary in terms of the regulations; and a letter from the South African Hockey Association did not suffice as a proper peer group consultation) [hereinafter *The Field Hockey Coach I*]; *In re* —, AAU LIN 97 176 50350, 1998 WL 34049093 (AAU Aug. 13, 1998) (granting visa to field hockey consulting coach because the coach had his teams internationally recognized for winning the Silver Medal at the 1992 Olympics; his teams also won lesser awards such as the European Cup; and the coach had been employed by several German National Field Hockey teams) [hereinafter *The Field Hockey Coach II*]; *In re* —, AAU LIN 95 245 50293, 1998 WL 34048826 (AAU June 26, 1998) (denying visa to a youth soccer coach for failure to prove extraordinary ability despite evidence that the coach had played ten years in the English First Division; and had obtained a class “A” coaching license because the coach’s playing record did not reflect on extraordinary ability as a coach; simply obtaining an “A” license did not place the coach at the very top of the field; and no evidence was provided to prove that an “A” license is given to reward a coach for outstanding achievements) [hereinafter *The English Soccer Coach*]; *In re* —, AAU LIN 97 209 50724, 1998 WL 34048822 (AAU June 25, 1998) (granting visa to a volleyball coach who had been an assistant coach at Wichita State; gave evidence of winning All-Conference awards four times in college, and several other awards as a player and coach; had coached at the USA National Summer Camp programs; assisted at USA Volleyball National Tryouts; assisted in recruiting players as an assistant coach and therefore participated as a judge of others; and had been paid a salary of \$30,827 which was high in relation to that of other volleyball coaches) [hereinafter *The Well-Paid Volleyball Coach*]; and *In re* —, AAU EAC 93 181 50715, 1996 WL 33418610 (AAU Nov. 20, 1996) (denying visa to a soccer coach for failure to establish extraordinary ability despite evidence that the coach had been twice nominated for All-American in soccer as a player and articles attested to the coach’s ability as a player, because recognition as a player did not translate to recognition as a coach; and the proposed salary of \$20,800 did not appear to be a high salary under the circumstances) [hereinafter *The All-American Soccer Coach*].

<sup>51</sup> INA § 101(a)(15)(P), 8 U.S.C. § 1101(a)(15)(P) (2000); 8 C.F.R. § 214.2(p)(4)(i)-(ii) (2004). Internationally recognized is defined as “a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the

support personnel, basing their classification on a relationship with an individual or team holding a valid P visa.<sup>52</sup> To obtain P visas, the “soccer prospects” would have to satisfy the evidentiary standard of “international recognition” through submission of documents and the production of a favorable advisory opinion from a labor group consultation.<sup>53</sup> Unlike the requirements for an O visa, however, the

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extent that such achievement is renowned, leading, or well-known in more than one country.” 8 C.F.R. § 214.2(p)(3). The duration of validity for a P visa illustrates another more lenient standard for P visa applicants than O visa applicants because P visas remain valid for up to five years, with the actual duration established again by the USCIS Director. 8 C.F.R. § 214.2(p)(8)(iii)(A). Professional athlete for P visas means “a person who derives his livelihood from athletic activity,” which is different from the definition of professional athlete as applied to O visas and employment based visas. *In re* —, AAU LIN 99 083 51135, n. 2 (AAU Jan. 21, 2003) [hereinafter *The Rugby Player I*]; see *supra* note 36 (defining “professional athlete” for all other visas). The regulations for a P visa further note that any athlete applying for a P visa under the internationally recognized team category may only perform services distinct to that team. 8 C.F.R. § 214.2(p)(4)(i)(B). See generally *Carp & Goldman*, *supra* note 48; *Danielson*, *supra* note 48; *Glucoft & Pucker*, *supra* note 48; *Patrick*, *supra* note 32; *Wolsdorf & Tomson*, *supra* note 48; *Greller*, *supra* note 48; *Jordan*, *supra* note 29; *Worden*, *supra* note 30.

<sup>52</sup> 8 C.F.R. § 214.2(p)(4)(iv). Compare *In re* —, AAU LIN 97 152 52423, 1999 WL 33600737 (AAU Jan. 4, 1999) (denying renewal for a fourth season of a minor league head hockey coach despite arguments that an essential support person may be entitled to indefinite classification due to prior essential support classification; and a contract between the Carolina Hurricanes of the NHL and the coach’s team, the Spokane Chiefs, had anticipated the assigning of P visa players to the Chiefs because no affiliated P visa-holding-player was on the coach’s team; the coach did not have an affiliation with a major league team; the contract only conferred rights on the Hartford Whalers of the NHL to assign the player in question, not the Carolina Hurricanes, and the contract mentioned the American Hockey League, not the Western Hockey League which the Chiefs were a part of; and arguing that in the past and in the future that the Chiefs could hold a P visa-holding player was not enough to overcome the burden of proof of essential support person), with *In re* —, AAU LIN 95 194 53264, 1995 WL 1797527 (AAU Dec. 15, 1995) (sustaining an appeal of a minor league hockey coach after evidence was provided that P visa-holding players would be coached by the coach). See also *In re* —, AAU LIN 99 168 50894, 2001 WL 34078013 (AAU Feb. 28, 2001) (denying an essential support visa to the Director of Community Relations of the Phoenix Coyotes of the NHL because the woman’s services were not considered essential support to the hockey organization; scheduling community appearances and relocation support were not jobs of a “highly skilled” worker; and filing as an essential support alien of a U.S. team is per se unavailable, because the team itself must be alien as well).

<sup>53</sup> 8 C.F.R. § 214.2(p)(7); 8 C.F.R. § 214.2(p)(4)(ii)(B). An adequate petition should include:

- (1) A tendered contract with a major United States sports league or team, or a tendered contract in an individual sport commensurate with international recognition in that sport, if such contracts are normally executed in the sport, and
- (2) Documentation of at least two of the following:
  - (i) Evidence of having participated to a significant extent in a prior season with a major United States sports league;



- (ii) Evidence of having participated in international competition with a national team;
- (iii) Evidence of having participated to a significant extent in a prior season for a U.S. college or university in intercollegiate competition;
- (iv) A written statement from an official of the governing body of the sport which details how the alien or team is internationally recognized;
- (v) A written statement from a member of the sports media or a recognized expert in the sport which details how the alien or team is internationally recognized;
- (vi) Evidence that the individual or team is ranked if the sport has international rankings;
- (vii) Evidence that the alien or team has received a significant honor or award in the sport.

8 C.F.R. § 214.2(p)(4)(ii)(B). Unlike an O visa, however, P visa applicants may not substitute consultation with a labor group with consultation with a peer group. *In re* -, AAU WAC 99 185 51102, 2 (AAU Dec. 8, 2000); see *supra* note 48 (discussing the purpose, function, and procedure of the consultation process for athletes); see also, for an illustration of the required evidentiary documents and the discretion of the USCIS, *In re* -, AAU LIN 99 028 50810 (AAU Mar. 31, 2003) (denying a visa to a soccer player because the initial petition had been originally approved under the impression that the player's new team was a member of MLS when it really was a member of the USISL Premier Development League and thus not a major league team); *In re* -, AAU WAC 01 067 53445 (AAU Jan. 30, 2003), *The Rugby Player I*, AAU LIN 99 083 51135 (AAU Jan. 21, 2003) (both denying a visa to a rugby player for failure to prove competition at an internationally recognized level despite the fact that the player himself was found to be an internationally recognized athlete, because not all members of the team were paid for playing or derived their livelihood from rugby and thus could not be considered professional; the team had been described as mostly made up of amateurs and rugby enthusiasts; although the team was a member of U.S. Men's Club rugby Division I, it did not have the highest ranking of U.S. rugby teams (that honor was held by the Eagles—the U.S. all-star national team) and thus could “not be considered a team of principal importance in U.S. rugby;” the player's salary was only twenty-five thousand dollars, thus not indicative of athletic competition at the highest professional level; the team did not have significant television contracts; no professional rugby league exists in the U.S.; and no evidence was provided to show the team would compete in any internationally recognized competition) [hereinafter *The Rugby Player II*]; *In re* -, AAU EAC 01 066 50664, 2001 WL 34078359 (AAU Oct. 17, 2001) (denying a visa to a tennis player/instructor because no contract of employment had been submitted; the consultation letter from the regional office of the United States Tennis Association was from a local chapter, not from the national body which is authorized to give labor consultations; and P-1 classification is not available to coaches at schools devoted to the sport); *In re* -, AAU EAC 96 161 53815, 1998 WL 34057234 (AAU June 19, 1998) (denying a visa to a soccer player despite playing for the Rochester Raging Rhinos of the A-League (minor league of MLS), for the New Hampshire Ramblers of the United System of Independent Soccer Leagues (“USISL”), for the White Eagles of the Canadian National Soccer League, and for teams in Ghana; and the Registrar of the A-League had given labor consultation to the player as having soccer talent of the highest caliber because participation with the Ramblers, White Eagles, and Ghanaian teams established nothing for ability; the player had not participated in any international competition with a national team; the player had not played for a U.S. college or university during the prior season; and letters from coaches established that the player could become a world-class athlete in the future but had not been so presently); *In re* -, AAU LIN 97 167 52173, 1997 WL 33306113

“soccer prospects” would be required to demonstrate that they still maintained a residence outside of the United States that they did not intend to abandon.<sup>54</sup>

*d. H Visas*

Although the regulations for both the O and P visa provide an athlete with latitude in proving extraordinary ability or international recognition, many athletes, especially young talent like the “soccer prospects,” may not possess the resumé needed to qualify for these visas despite playing at a level indicative of some prominence in the sport.<sup>55</sup> ALJs may still grant nonimmigrant admission into the United States to such players under the pre-Immigration Act of 1990, INA, H-1B, or H-2B visas.<sup>56</sup>

Unlike other nonimmigrant athletes, H-2B applicants must receive temporary labor certification before filing a petition for a visa.<sup>57</sup> Labor certification for H-2B entails a finding by one of the Regional Administrators of the Employment and Training Administration of the Department of Labor that no other qualified workers are available and the employment of the alien athlete will not adversely affect wages or working conditions for like-situated American workers.<sup>58</sup>

A denial of an H-2B visa because of improper labor certification can be directly appealed to the Board of Immigration Appeals (“BIA”), which acts as an appellate body in the Executive Office for Immigration Review under the auspices of the Department of Justice. The BIA’s

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(AAU Dec. 16, 1997) (granting a visa to a soccer player for three years despite the Director’s finding that the team the player would play for is not a “major league” team because the player’s team was a member of the A-League which had been asserted as “major league” by the Secretary General and Executive Director of the United States Soccer Federation and had been accepted by the USCIS) [hereinafter The A-League Soccer Player].

<sup>54</sup> INA § 101(a)(15)(P), 8 U.S.C. § 1101(a)(15)(P) (2000).

<sup>55</sup> O.I. 214.2(h)(7)(vii)(B); *see supra* Parts II.B.1.b, c and accompanying text (discussing the latitude, or lack thereof, given athletes in proving extraordinary ability or international recognition).

<sup>56</sup> INA § 101(a)(15)(H)(ii)(b), 8 U.S.C.A. § 1101(a)(15)(H)(ii)(b) (Supp. 2004); *see supra* notes 22-31 and accompanying text (describing the process and criteria for obtaining an H-1B, alien of distinguished merit or ability, or H-2B visa, alien filling a position in which no other American worker is available).

<sup>57</sup> 8 C.F.R. § 214.2(h)(6)(iii)(A) (2004); *see, e.g., In re —*, AAU LIN 99 200 50906, 1999 WL 33636366 (AAU July 26, 1999) (affirming the visa of an amateur hockey player); *In re —*, AAU LIN 95 210 50055, 1995 WL 1796680 (AAU Nov. 13, 1995) (affirming the visas of hockey players); *In re —*, AAU EAC 95 028 51061, 1995 WL 1796607 (AAU Mar. 28, 1995) (affirming the visa of a youth soccer coach).

<sup>58</sup> 20 C.F.R. § 655.3(a) (2004).

## 558 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

decisions are binding upon lower Department of Homeland Security ("DHS") bureaus.<sup>59</sup> Also, H-2B applicants must maintain a residence outside of the United States and the work may be permanent or temporary.<sup>60</sup> Most importantly, however, the government allots H-2B visas on a quota system, therefore ALJs will summarily deny H-2B visas where the numerical limit of H-2B visas granted to each sports league by the Department of Labor has been exceeded.<sup>61</sup>

## 2. Immigrant Visas

Any of the "soccer prospects" who wish to remain in the United States as permanent resident aliens may obtain three employment-based immigrant visas.<sup>62</sup> The Immigration Act of 1990 amended the INA's preference system to create a program in which all employment-based applicants, athletes included, whether immigrant or nonimmigrant, compete for a share of approximately one hundred forty thousand annual employment-based visas.<sup>63</sup> Employment-based immigrant visa applicants follow the same application and administrative appeals

<sup>59</sup> BIA Interim Decisions, available at <http://uscis.gov/graphics/lawsregs/biadec.htm> (last visited Oct. 4, 2004). The BIA may also designate a decision as precedent to be followed by all other immigration courts. 8 C.F.R. § 3.1(a)(5) (2004).

<sup>60</sup> INA § 101(a)(15)(H)(ii)(b), 8 U.S.C.A. § 1101(a)(15)(H)(ii)(b) (Supp. 2004); 8 C.F.R. § 214.2(h)(6)(ii)(B) (2004); 8 C.F.R. § 214.2(h)(6)(ii)(A) (2004) (codifying *Matter of Artee Corp.*, 18 I. & N. Dec. 366, available at 1982 WL 190706 (BIA 1982)).

<sup>61</sup> O.I. 214.2(h)(7)(vii)(D). B, O, and P visas maintain nonquota status. See *infra* note 63 and accompanying text (explaining the quota process). The Department of Labor limits the number of H-2B visas to 66,000 annually, with each visa having a maximum duration of one year. Siskind Susser Immigration Lawyers, *The ABC's of Immigration – Visa Options for Athlete*, available at <http://www.visalaw.com/03apr2/2apr203.html> (last visited Oct. 4, 2004).

<sup>62</sup> See *infra* Part II.B.2 and accompanying text; Steven M. Ladik, *Employment-Based Immigrant Visas*, SD61 ALI-ABA 63 (1999); Angela Diggs Jackson & Karen R. Maheu, Comment, *Employment Related Immigration*, 3 J. INT'L & PRAC. 169 (1994); Farnoush Nassi, Comment, *Into the Labyrinth: Artists, Athletes, Entertainers, and the INS*, 19 LOY. L.A. ENT. L.J. 107 (1998).

<sup>63</sup> INA §§ 201(d), 203, 8 U.S.C. §§ 1151(d), 1153 (2000). One hundred forty thousand is a rough estimate because the actual number for the first through third preferences is not more than 28.6 percent of the worldwide allocation of employment-based immigrant visas per INA § 201(d). Originally, 140,000 was the precise number, but the Immigration Act of 1990 was amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 to allow the 140,000 to be increased by any leftover family-sponsored visas of the 260,000 annual worldwide level allotted to unmarried sons and daughters of citizens; spouses, unmarried sons and unmarried daughters of permanent resident aliens; married sons and married daughters of citizens; and brothers and sisters of citizens. Pub. L. No. 102-232 § 302(a)(1), 105 Stat. 1733 (1991); INA § 203(a)(1)-(4), 8 U.S.C. § 1153(a)(1)-(4) (2000); see *supra* Part II.B.1.d and accompanying text (discussing the H-2B nonimmigrant visa category).

process as nonimmigrant visas, including appeals to the federal circuit. However the issuing Director will not supply the applicant with a notice of intent to deny.<sup>64</sup> Also, employment-based applicants may find relief by utilizing the appellate functions of the BIA.<sup>65</sup>

*a. Extraordinary Ability*

Athletes of “extraordinary ability,” who have achieved and been recognized for national or international acclaim, may qualify for a first preference, EB-1, immigrant visa.<sup>66</sup> Although the regulations would require the “soccer prospects” to “substantially benefit prospectively the United States,” the definition of extraordinary ability has been deemed identical to that of the O visa by USCIS interpretation and judicial application.<sup>67</sup> This distinction between the two types of extraordinary

<sup>64</sup> 8 C.F.R. § 204.5(n)(2) (2004); *see supra* Part II.B.1 (discussing the application and appeals process of nonimmigrant visas).

<sup>65</sup> 8 C.F.R. §§ 3.1(b)(5), 214.2(h)(3); INA § 204(a)(1)(E)-(F), 8 U.S.C. § 1154(a)(1)(E)-(F) (2000); *see supra* note 59 and accompanying text (describing the role and function of the BIA).

<sup>66</sup> INA § 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A); *see* AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGR. FUNDAMENTALS: GUIDE TO L. & PRAC. § 2:3.1 (2001); Ladik, *supra* note 62; Wiess, *supra* note 35; Jackson & Maheu, *supra* note 62; Nassi, *supra* note 62.

<sup>67</sup> H.R. Rep. No. 101-723, 101st Cong., 2d Sess. (1990). The relevant evidence needed to prove extraordinary ability mirrors the O visa criteria, but the two lists are not identical. *See supra* note 49 (giving the evidentiary criteria for extraordinary ability for O visas that mirrors that of its immigrant visa counterpart). Evidence for employment-based immigrant statues includes:

(3) Initial evidence. A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

(i) Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

(iv) Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;

(v) Evidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

ability was clarified in *Buletini v. INS*,<sup>68</sup> in which the court concluded that the disregard of the regulation on the substantial benefit element led to the assumption that simply meeting the criteria would benefit the United States in some fashion.<sup>69</sup> Therefore, almost any interpretation of extraordinary ability, except perhaps one involving detrimental admission, will apply to both the immigrant and nonimmigrant extraordinary standards.<sup>70</sup>

USCIS Directors and ALJs have not implemented the numerous criteria from the regulations that the “soccer prospects” must satisfy to

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- (vi) Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media;
  - (vii) Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases;
  - (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
  - (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
  - (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.
- (4) If the above standards do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence to establish the beneficiary’s eligibility.

8 C.F.R. § 204.5(h) (2004).

<sup>68</sup> 860 F. Supp. 1222 (E.D. Mich. 1994).

<sup>69</sup> *Id.* at 1229. Petrit Buletini was an Albanian physician who had applied for an EB-1 visa but was denied by the USCIS despite being an expert in hyperextensive nephrology who served as head of numerous commissions and programs in his native country. *Id.* at 1224-25. Buletini also composed numerous articles and papers, and his research led to the introduction of dispensary facilities in villages throughout Albania. *Id.* at 1225. Buletini wrote a book about the history of public health in his region of Albania which garnered him “The Medal for Good Service to the People,” equivalent to a U.S. Congressional Medal of Honor. *Id.* at 1225. The doctor was paid the highest salary possible, greater than twice the salary of an average doctor, and over a ten year period he wrote a German-Albanian medical dictionary that was scheduled to be published but was withheld due to lack of funds. *Id.* at 1225. Numerous letters attesting to available employment from U.S. hospitals and practices also were provided by Buletini to the USCIS. *Id.* at 1226. The Court found the USCIS Director’s denial of Buletini’s visa on grounds that he was not of extraordinary ability as a scientific researcher in nephrology too narrow of a standard under the INA and the C.F.R., and instead saw the proper standard as a doctor of medicine. *Id.* at 1229. Further, the Court concluded that the Director erroneously discounted the Medal received by Buletini for not being of international recognition, when the C.F.R. merely calls for an award of national *or* international acclaim. *Id.* at 1230. The Court also found that Buletini satisfied three of the ten categories outside of already receiving a nationally acclaimed award, and therefore the USCIS abused its discretion in denying Buletini his visa. *Id.* at 1231-34.

<sup>70</sup> Ladik, *supra* note 62, at 66.

prove extraordinary ability as a true test. Instead, both utilize considerable discretion and subjectivity in determining extraordinary ability.<sup>71</sup> For example, in *Matter of Price*,<sup>72</sup> professional golfer Nick Price

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<sup>71</sup> See, e.g., *In re —*, AAU WAC 01 242 52268, 2003 WL 2007964 (AAU Feb. 6, 2003) (denying a visa to a Sepak Takraw player for failure to prove extraordinary ability despite evidence that the applicant was the captain and top player of the Chinese Sepak Takraw Team; captain and top player for the Guangxi Nanning Sepak Takraw Team; won the gold medal at the King's Cup Sepak Takraw World Championships; certification from the People's Republic of China indicating the applicant had received the "Quality Test Competition First Prize" and the "Sportsmanship and Morality Award" at the 1991 National Youth Sepak Takraw games; earned Nanning Sports Working Team Outstanding Judge of 1996; and coached China's Sepak Takraw team to a gold medal at the Thai King's Cup World Sepak Takraw Championship because the U.S. National Takraw Championships are open to any team consisting of three U.S. citizens, regardless of ability; some of the awards mentioned had not been established by conclusive evidence; the Sportsmanship award has nothing to do with acclaim; no evidence was provided about the applicants world championships; the Outstanding Judge award was not established by other evidence; participation in national or international events is not an original athletic contribution; and the assertions of the Chinese Sepak Takraw Association about the Thai King's Cup World Sepak Takraw Championship did not establish any degree of interest in the competition besides the participants) [hereinafter *The Sepak Takraw Champion*]; *In re —*, AAU EAC 98 031 52171, 1999 WL 33588978 (AAU Feb. 3, 1999) (denying a visa to a wrestler for failure to prove extraordinary ability despite winning five first place awards at Romanian and Polish international events; being selected for the Romanian Olympic Team in 1992; obtaining a number four national ranking for his weight class in NCAA Division III; and winning the NCAA Division III National Championship with an undefeated record because four of the five first place finishes had not been indicated as national or international in scope; the wrestler had not won any national awards or honors since coming to the United States except statewide competitions; the wrestler had not competed with the Romanian Olympic Team for which he had been selected; articles written about the wrestler only briefly mentioned him and none had been established as from national publications; the numerous statements from the President of USA Wrestling, the National Team Director of USA Wrestling, the Head Wrestling Coach at Montclair State University, a Greco-Roman Wrestling Coach at the New York Athletic Club, and a coach at the Ultimate Wrestling Club had only expressed confidence in abilities of future accomplishments and not present contributions to the sport of wrestling; the national championship was won after the petition was filed; and the acclaim recognized for the wrestler has been limited to the New York/New Jersey area, instead of nationally); *In re —*, AAU EAC 97 156 53387, 1998 WL 34022189 (AAU Aug. 6, 1998) (denying a visa to baseball coach/instructor for failure to prove extraordinary ability because the only evidence offered to prove extraordinary ability was a salary that placed the coach in the upper forty percent of all like-situated coaches, and statements from witnesses attesting to the coaches membership with the California Angels minor league system during 1988, the Milwaukee Brewers from 1984-87 and 1989-90, and the Chicago Cubs minor league system at some time) [hereinafter *The Minor League Baseball Coach*]; *In re —*, 1997 WL 33170686 (AAU July 1, 1997) (denying a visa for a tennis player despite proof that the player had won international tournaments in thirteen different countries and had a singles ranking as high as forty-six and steadied around ninety-eight because some of the victories constituted lesser prizes; the player had not won any major tournaments; articles in Russian, German, Italian, and Spanish without translations cannot be introduced as evidence; her winnings dramatically decreased over a period of time; her ranking placed her in the middle of the

## 562 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

was found to be an athlete of extraordinary ability due to his golf resumé and numerous affidavits from famous golfers.<sup>73</sup> *Matter of Price* had become an evidentiary benchmark for many visa applications, yet in *The Minor League Ice Hockey Coach*,<sup>74</sup> a highly successful ice hockey coach was denied a visa for failure to prove extraordinary ability despite numerous similar achievements and affidavits.<sup>75</sup>

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pack; and letters and affidavits sent by celebrated tennis players were merely fill-in-the-blank letters probably written by the applicant for the applicants' benefit) [hereinafter The High-Ranked Tennis Player]; *In re* —, AAU LIN 94 082 50371, 1995 WL 1797517 (AAU Oct. 30, 1995) (denying a visa to a soccer coach for failure to prove extraordinary ability despite evidence that the coach had attained the highest level of coaching; had created the Yugoslav National Youth Team which won the 1987 World Cup; had coached a team to win the National Cup because simply achieving such a coaching level was not indicative of extraordinary ability; the benefit to young soccer players could easily be given by other competent coaches; the coaching resumé for the Yugoslav National Youth Team had not been established to coincide with the World Cup victory; and the coach's salary did not appear to be high for professional athletes) [hereinafter The Yugoslavian Soccer Coach]; see *International History: Origins of Sepak Takraw in the World*, available at <http://www.takrawcanada.com/frameset.html> (last visited Oct. 4, 2004) (explaining the origins and method of play for Sepak Takraw, which is essentially a game using every part of the body except the hands and arms, played like volleyball with two teams and a net and points received for placing the ball over the net into the other team's court).

<sup>72</sup> 20 I. & N. Dec. 953 (BIA 1994). Evidence as obvious as Price's evidence is not often seen in decisions appealed to the AAU or BIA. Usually these cases illustrate the wide range of discretion used by Directors and ALJs.

<sup>73</sup> *Matter of Price*, I. & N. Dec. at 955. Price's resumé included winning two internationally recognized competitions, ranking tenth on the PGA tour for 1989, and earning \$714,389 in 1991. *Id.* Price also submitted numerous affidavits from well-known golfers such as Jack Nicklaus and Lee Trevino and newspaper articles from national publications like *Golf Digest* and *Golf Magazine*, which further proved his sustained national and international acclaim. *Id.* at 955-56.

<sup>74</sup> *In re* —, 2001 WL 34077907 (AAU Apr. 13, 2001) [hereinafter *The Minor League Ice Hockey Coach*].

<sup>75</sup> *Id.* at \*2-7. The coach's resumé included winning Minor League Pro Coach of the Year, winning the Turner Cup (the International Hockey League ("IHL") championship trophy, seen as the Stanley Cup of the IHL), coaching the 1995 IHL All-Star Game, serving as a professional scout for the St. Louis Blues, submitting numerous affidavits from well-known coaches such as Ken Hitchcock and Scott Bowman, and receiving the third highest salary among coaches in the IHL. *Id.* The USCIS and the AAU decided that the coach had not shown extraordinary ability because awards such as Minor League Coach of the Year and Turner Cup Champions were not "household names" that could be easily recognizable (essentially lesser known); coaching at the minor league level automatically implies not being one of the top coaches in hockey; all awards could not be considered "lesser nationally or internationally recognized prizes or awards" because they are inherently minor league; articles in newspapers only came from regional, not major publications; the professional scout position held with the St. Louis Blues was not yet a coaching position per se and thus not applicable; the coach did not present evidence that his team sold more tickets than other teams; the coach's minor league hockey teams had not enjoyed a distinguished reputation as compared to the Detroit Red Wings, Boston Bruins, or other

In a series of cases involving players of the National Hockey League ("NHL"), the Northern District of Illinois attacked some of these discretionary disparities and created several key evidentiary points of law that apply to all athletes.<sup>76</sup> Despite the numerous criteria and countless professional sports, these few cases represent almost all of the athlete-promulgated AAU cases appealed to the federal circuit or the BIA. This lack of binding decision-making illustrates how ALJs still possess considerable discretion when determining extraordinary ability, as well as the other visa categories.

In *Racine v. INS*,<sup>77</sup> the court agreed with the USCIS that simply being a member of the NHL did not warrant a blanket finding of extraordinary ability.<sup>78</sup> However the court concluded that membership on a world championship team paralleled an internationally recognized award, and that articles about a player need not mention whether or not the player is one of the best.<sup>79</sup> In *Grimson v. INS*,<sup>80</sup> the court warned that evidence of a player's salary needed reasonable comparison with others because

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teams recognized by hockey enthusiasts; the coach had never been a head coach in the NHL, nor with a highly regarded team in the NHL; the coaching records of Ken Hitchcock and Scott Bowman seemed to belittle the coaching record of the applicant coach; and the coach's salary was not compared to salaries of other NHL coaches. *Id.*

<sup>76</sup> See *infra* notes 77-86 and accompanying text. Despite the holdings of the NHL cases, judicial discretion remains part of visa decision making, as seen by the fact that *The Minor League Ice Hockey Coach* was decided in 2001, five years beyond the last NHL case. *The Minor League Ice Hockey Coach*, 2001 WL 34077907 (AAU Apr. 13, 2001).

<sup>77</sup> *Racine v. INS*, 1995 WL 153319 (N.D. Ill. 1995).

<sup>78</sup> *Id.* at \*4. The USCIS had originally awarded Racine an EB-1 visa, but then subsequently rejected it because there were no media publications asserting that Racine was considered one of the best players in the NHL, despite no clear change in Racine's abilities or performance record. *Id.* at \*1-2. Yves Racine's professional hockey resumé included a role on Team Canada's 1991 Silver Medal-winning team at the World Championships, fifth-best scoring and third-best assists among defenseman, and a salary of \$225,000 with a total contract worth \$660,000. *Id.* at \*5-7. Other evidence provided by Racine included publications by the media, including an affidavit by Darren Pang, an NHL announcer and former NHL goalie, which stated Racine was not only a player of extraordinary ability but also one "whose presence will be felt in the NHL for many years to come." *Id.* at \*6. Even more, Racine presented evidence that three other players had recently been awarded EB-1 visas, and a quick comparison between Racine and one of those players, Steve Smith, showed that their playing statistics were almost identical, while another player, Rob Brown, was no longer playing in the NHL but instead for an NHL farm team. *Id.* at \*7. The Court concluded that the USCIS had been unreasonable in its decision to deny Racine a visa and the USCIS decision had not been supported by substantial evidence, and thus remanded the case back to the USCIS. *Id.* at \*8.

<sup>79</sup> *Id.* at \*6.

<sup>80</sup> *Grimson v. INS*, 1995 WL 134755 (N.D. Ill. 1995) [hereinafter *Grimson I*].



## 564 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

tremendously high salaries for superstars may skew league averages.<sup>81</sup> The court in *Muni v. INS*<sup>82</sup> established that extraordinary ability need not only apply to league superstars, because setting the bar that high would exceed even the “small percentage” standard created by the USCIS.<sup>83</sup>

<sup>81</sup> *Id.* at 3. Stu Grimson, NHL enforcer, was denied an EB-1 visa twice by the AAU and Director for failure to show sustained national or international acclaim. *Id.* at 1-2. Grimson argued that sustained membership over a period of years in the NHL should be enough to satisfy extraordinary ability. *Id.* at 3. Grimson submitted evidence of a three hundred thousand-dollar-salary, a 1993 All-Star Game skills competition invitation, numerous articles from national media, and the awarded visas of three other NHL players as comparison cases. *Id.* at 3. The District Court of the Northern District of Illinois remanded to the AAU again, which subsequently denied Grimson’s petition for a third time, despite further evidence, including an affidavit from Darren Pang listing all the enforcers of the league and stipulating that at the time of filing his petition, Grimson was the fifth best enforcer in the NHL. *Id.* at 4; Grimson v. INS, 934 F. Supp. 965, 967-68 (N.D. Ill. 1996) [hereinafter Grimson II]. The USCIS Director denied the visa on the grounds that Pang’s affidavit was mere assertion, without any backup evidence of the role, necessity, or place of enforcers in the NHL. Grimson II, at 968. The Court then concluded that the consistent denials by the Director were merely for a dislike of the position Grimson played in the NHL, an enforcer, evidenced by the Director’s opinion that “[t]he necessity of such a role appears to be debatable,” and “the sport itself has never condoned the kind of activity that petitioner is known for, as evidenced by the number of penalty minutes he is charged.” *Id.* at 968 (emphasis in original). The evidence offered in support of Grimson only stipulated that the role of an enforcer is necessary to a successful hockey team, and because no evidence was found to the contrary, Grimson had met his burden of proof as being among the top players in the world, thereby deserving a visa. *Id.* at 969.

<sup>82</sup> *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995).

<sup>83</sup> *Id.* at 446. Craig Muni, NHL defenseman, had played in the NHL for twelve seasons, amassing three Stanley Cup trophies with the Edmonton Oilers, the fourth best plus-minus ratio for the 1988-89 season, *Goal* magazine’s 1990 “most underrated defenseman,” and *Hockey Digest*’s top ten hitting defensemen list for 1991. *Id.* at 441. When Muni filed for his EB-1 visa, his annual salary was four hundred thousand dollars, and he offered further proof of his ability with newspaper articles and eight affidavits from other veteran NHL players attesting to his reputation as one of the best defensemen in hockey. *Id.* at 441-42. The USCIS Director denied Muni’s visa on grounds that the evidence only proved noteworthiness because his salary was not commensurate with other NHL players of extraordinary ability; because the magazine awards had not been explained; and because the newspaper articles only established his improvements as a player, his role on the Oilers’ championship teams, and his memorable stature as playing with bleeding sutures. *Id.* at 442. The Court agreed with Muni that there exists a strong correlation between a player’s performance and the performance of the team, and Muni’s three Stanley Cups as a key player on the team illustrated extraordinary ability. *Id.* at 444. Second, the Court felt that the Director’s desire to have the magazine awards explained was unnecessary because the awards themselves were self-explanatory, and the magazines were the two most reputable hockey magazines in print. *Id.* at 444. Third, the Court found that Muni’s salary, above that of the average defensemen, was evidence that he commanded a high salary. *Id.* at 444-45. Lastly, the affidavits provided by the other players, which the USCIS completely overlooked, provided clear evidence that the facts of the case had not been adequately considered. *Id.* at 445. In totality, therefore, Muni had received an internationally recognized award, the Stanley Cup, three times, and fulfilled five of the ten C.F.R.

Another case, *Russell v. INS*,<sup>84</sup> posited that extraordinary ability would not be granted retrospectively, as in the case where a player tries to argue past ability when no longer an active professional player.<sup>85</sup>

Several other cases have held success as an athlete may illustrate extraordinary ability, but athletes must also focus their applications on the precise field in which they have proven extraordinary ability.<sup>86</sup> For instance, in *Lee v. Ziglar*,<sup>87</sup> Man Soo Lee came to the United States as one of Korea's most honored and famous baseball players, amassing Babe Ruth-like accomplishments, but the USCIS denied his application for extraordinary ability as a baseball coach.<sup>88</sup> Lee argued that he needed to prove extraordinary ability as a player and an intent to coach in the same sport, but the federal court negated that argument and narrowed the term "area of extraordinary ability" to create a distinction between playing and coaching.<sup>89</sup>

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categories, which was clearly evidence of abuse of discretion by the USCIS, especially since nothing had been explained by the USCIS as to why such evidence was unnecessary. *Id.* at 445-46.

<sup>84</sup> *Russell v. INS*, 2001 WL 11055 (N.D. Ill. 2001).

<sup>85</sup> *Id.* at 3. Cam Russell played ten seasons in the NHL as a defenseman, and played on a nonimmigrant visa for each of these seasons. *Id.* at 1. In 1997, Russell applied for an EB-1 visa, offering as evidence a resumé of his career, statistics, salary information, media publications, and affidavits from current and former NHL players. *Id.* at 1. The USCIS denied Russell's petition, and after several procedural delays and decisions, Russell appealed, but he had prematurely retired from the NHL due to injury before the appeal was heard by the District Court. *Id.* at 2. Despite retirement, Russell urged that he still satisfied all the necessary requirements for an alien of extraordinary ability. *Id.* Unfortunately, the Court disagreed. *Id.* The Court held that Russell's appeal was mooted by his retirement, but even if it had not been, the Court would have affirmed the dismissal of the AAU for failure to satisfy at least three of the ten requirements for extraordinary ability. *Id.* at 3. Included in the AAU's decision was the determination that early selection in the NHL draft had no bearing on ability, media reports from Chicago newspapers were not "national," and salary information must be substantiated with information explaining where the player's salary sits among the median salaries of the NHL. *Id.* at 4.

<sup>86</sup> *See, e.g.*, *Russell v. INS*, 2001 WL 11055 (N.D. Ill. 2001); *The Minor League Ice Hockey Coach*, 2001 WL 34077907 (AAU Apr. 13, 2001); *The Minor League Baseball Coach*, AAU EAC 97 156 53387, 1998 WL 34022189 (AAU Aug. 6, 1998); *The All-American Soccer Coach*, AAU EAC 93 181 50715, 1996 WL 33418610 (AAU Nov. 20, 1996); *The Yugoslavian Soccer Coach*, AAU LIN 94 082 50371, 1995 WL 1797517 (AAU Oct. 30, 1995) (holding a visa applicant's abilities as a player can have no effect upon the determination of ability for a coaching position).

<sup>87</sup> *Lee v. Ziglar*, 237 F. Supp. 2d 914 (2002).

<sup>88</sup> *Id.* at 915-16. During his sixteen seasons as a catcher, Lee hit 252 home runs, had numerous All-Star appearances, and won the Triple Crown, five Golden Gloves, and a season MVP. *Id.* at 915-16.

<sup>89</sup> *Id.* at 917-18; *see also In re —*, AAU EAC 00 157 52814, 2002 WL 32075879 (AAU Jan. 11, 2002) (denying a visa to a volleyball trainer, player, and coach for failure to prove

*b. Exceptional Ability*

If any of the “soccer prospects” suspect they do not qualify under extraordinary ability, they may still obtain a visa under the second INA preference, EB-2, for an alien of “exceptional ability” in science, art, or business who will substantially benefit prospectively the United States and whose services are sought by an employer.<sup>90</sup> Despite the absence of the term “athlete” in the statute, the Office of the General Counsel decided to follow the history of statutory interpretation for the term “arts” and considered athletics to be an art form.<sup>91</sup> ALJs apply certain criteria to EB-2 applications, and the applicants must also have received prior labor certification unless a national interest waiver is obtained.<sup>92</sup>

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extraordinary ability despite being the captain of the volleyball team at Brigham Young University-Hawaii; winning the NAIA national championship twice; winning first place medals at the National Universal Volleyball Games twice; winning second place medals from the National Sports School Volleyball Championships twice; selected for the Chinese National Junior Olympic Team twice; recruited to the Zhongnan University of Finance and Economics at sixteen for the National Universal Games; and coaching a team to a second place finish in the Connecticut Junior Olympic program). Despite these accomplishments, the visa was denied because all of the evidence led to the conclusion that the woman no longer competed as a player, but instead only as a coach, so her player record was inapplicable to the decision and her coaching record only consisted of a part-time, unpaid assistant coach position at Baruch College. *In re* —, AAU EAC 00157 52814, 2002 WL 32075879 (AAU Jan. 11, 2002). The letters from players and other witnesses only attested to their admiration for the woman, but not to her coaching ability or contributions to volleyball. *Id.*; see *In re* —, 1998 WL 2027170 (AAU May 14, 1998) (denying a visa for a youth soccer coach for failure to prove extraordinary ability, because although the applicant had achieved some acclaim for his play as a goalkeeper in Brazil and Portugal, an application for a coach can only rely on one’s ability to coach; thus the petition failed because the applicant was not filing for a position that required extraordinary ability, and no acclaim could be proven for his coaching abilities) [hereinafter *The Brazilian Soccer Coach*].

<sup>90</sup> INA § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A) (2000). Job offers do not per se satisfy the statutory job offer requirement, instead 8 C.F.R. § 204.5(k)(4)(i) (2004), which requires labor certification, controls. *In re* —, AAU EAC 98 085 50186, 1998 WL 34022372 (AAU Nov. 9, 1998); see generally Jackson & Maheu, *supra* note 62; Ladik, *supra* note 62; Wiess, *supra* note 35; Nassi, *supra* note 62.

<sup>91</sup> Legal Opinion, INS General Counsel, No. CO 203-P (Jan. 20, 1995) reproduced in 72 INTERPRETER RELEASES 175, 184 (Jan. 30, 1995); Wiess, *supra* note 35, at 1, 11-12; see *supra* note 27 and accompanying text (discussing how and why athletes should fall under the term “arts” under the INA).

<sup>92</sup> 8 C.F.R. § 204.5(k)(4)(i); 8 C.F.R. § 204.5(k)(4)(iii). 8 C.F.R. § 204.5(k)(3)(ii), (iii) states:  
 (ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:  
 (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school,

The national interest waiver removes the requirement of a job offer, and therefore the need to be certified by the Department of Labor, upon a showing that the applicant's immigration would be in the national interest of the United States.<sup>93</sup> As with extraordinary ability, the exceptional ability standard has no definition in either the INA or the CFR.<sup>94</sup> Furthermore, the USCIS has chosen not to define "national

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or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

8 C.F.R. § 204.5(k)(3)(ii), (iii); *see supra* notes 57-58 and accompanying text (discussing the labor certification process); *supra* notes 49, 53 & 67 and accompanying text (depicting the C.F.R. criteria for the O, P, and EB-1 categories).

<sup>93</sup> Michael D. Patrick, *Raising the Standards in "National Interest Waiver" Applications*, N.Y. L.J., Sept. 28, 1998, at 3.

<sup>94</sup> *See, e.g., In re -*, AAU WAC 98 040 53186, 1999 WL 33600712 (AAU Mar. 30, 1999) (denying the petition of a karate instructor for failure to prove exceptional ability despite being licensed as a nidan instructor and certified as a referee, because training in martial arts cannot be considered academic education; at twenty-six, it appeared unlikely that the karate instructor could have been employed full-time for at least ten years; membership in martial arts organizations that were not occupational in nature did not make the instructor exceptional; photos of several trophies, including participation in the Karate World Championships in 1993-94 and vice-captain of the South African Karate Team in 1994, when not explained or indicated as to significance, could not be recognized as being contributions as an instructor instead of as an athlete; assistant positions in instructional videotapes were not inherently demonstrative of exceptional ability; and holding a second degree black belt did not establish exceptional ability among karate instructors, because in order to become an instructor one must obtain a black belt) [hereinafter *The Young Karate Instructor*]; *In re -*, 1998 WL 34022283 (AAU Sept. 17, 1998) (denying the visa of a gymnastics coach for failure to prove exceptional ability despite holding several coaching, instructing and related certificates for coaching, because the coach was only a member of one professional association and the regulation calls for "associations"; certification as a National Safety Certifier is a license, not an award of recognition; letters of recommendation can only be offered as secondary evidence of recognition; and a Certificate of Achievement for the International Gymnastic Training Program earned when the coach was a twenty-year-old engineering student was most likely not issued only to experienced coaches) [hereinafter *The Safety Certified Volleyball Coach*]; *In re -*, AAU EAC 98 075 54714, 1998 WL 34022273 (AAU Sept. 16, 1998) (denying petition for

interest” and instead has opted to determine national interest on a case-by-case basis.<sup>95</sup> Recently, however, the BIA highlighted three non-

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employment as a boxer for failure to prove exceptional ability because although licensed to box in New York and New Jersey, such licenses are compulsory and thus not indicative of ability above that of peers; membership in the New York State Athletic Commission and the New Jersey State Athletic Control Board could not be considered membership in professional associations because membership automatically comes from licensing; newspaper articles featuring the boxer could not be considered recognition by peers; the assertions by counsel that the boxer currently holds the FBI number twelve ranking in the world for lightweight boxing was unsupported by evidence; and claims that the boxer held both the New York State Lightweight Belt and the New York State Welterweight Belt implied the concurrent possession of both titles from two separate weight classes despite evidence regarding the lightweight title) [hereinafter *The Boxer*]; *In re* –, 1997 WL 33171005 (AAU Nov. 19, 1997) (denying the petition of a soccer coach because proof that the coach possessed advanced training is not synonymous with an advanced degree; soccer coaching is not an occupation requiring an advanced degree; volunteer experience cannot count toward the required ten years of experience; evidence of a second job indicates coaching is not the full-time occupation; membership in the United States Soccer Federation (“USSF”) and FIFA is open to people entirely outside of soccer and therefore cannot be considered membership in professional associations; and holding an “A” level coaching license, despite being held by only two percent of USSF members, is not a significant contribution to the industry because the certification can be obtained by simply completing a training course) [hereinafter *The Certified Soccer Coach*]; and *In re* –, AAU A72 124 879, 1995 WL 1798405 (AAU Feb. 27, 1995) (denying the petition on other grounds of a director of coaching for a semi-pro and youth soccer club despite having at least ten years of full-time experience coaching soccer at the national and professional level, and having proved recognition by peers and various athletic associations including the “head coach of the Dallas Sidekicks, the director of operations of the United States Youth Soccer Association, the men’s soccer coach of Dartmouth athletics, the director of coaching and player development of the North Texas State Soccer Association, and the Liverpool Football Club”) [hereinafter *The Soccer Coaching Director*].

<sup>95</sup> Employment-Based Immigrants, 56 Fed. Reg. 60,897, 60,900 (Nov. 29, 1991) (summarizing comments on second preference applicants, including the assertion that although not defined, “national interest” is significantly above that necessary to prove the “prospective national benefit” of exceptional ability); Wiess, *supra* note 35, at 11; see, e.g., *The Young Karate Instructor*, 1999 WL 33600712 (denying the petition of a karate instructor for failure to prove exceptional ability, but also, for clarity, failure to obtain labor certification or a national interest waiver because arguments in a letter for a job offer about the importance of karate instructors was indicative of all instructors, not just those who would benefit the national interest; asserting the instructor will train potential champion-caliber martial artists without evidence of producing any in the past carries limited weight because future assertions may not accrue, the evidence must be of past accomplishments that will justify a prospective national benefit; and arguing that the instructor was trained in a special style of karate and was going to be hired for this unique style would be an argument for labor certification, not a national interest waiver); *The Safety Certified Gymnastics Coach*, 1998 WL 34022283 (denying the visa of a gymnastics coach for failure to prove exceptional ability, but also, for clarity, failure to obtain labor certification or a national interest waiver because evidence that a shortage of qualified gymnastics coaches is an argument for obtaining rather than waiving a labor certification; and holding a certificate as a National Safety Certifier does not establish a contribution to safety greater than similarly certified coaches); *The Boxer*, 1998 WL 34022273 (denying petition for

exclusive factors to be considered in evaluating “national interest” in *Matter of New York State Dept. of Transportation*:<sup>96</sup> first, is the area of employment sought of substantial intrinsic merit; second, is the proposed benefit national in scope; and third, will the alien serve, to a substantially greater degree than like-situated U.S. workers, the national interest.<sup>97</sup>

*c. Third Preference*

If the “soccer prospects” feel unqualified to satisfy the evidentiary requirements of EB-1 and EB-2, they may still qualify for admission under the skilled or unskilled labor third preference, EB-3 visa.<sup>98</sup> As with EB-2 petitions, EB-3 applicants must obtain labor certification, implying a need for an offer of employment, but EB-3 applicants cannot obtain a national interest waiver.<sup>99</sup> Skilled worker status pertains to any form of labor requiring at least two years training or experience, while unskilled workers merely must show an ability to perform the labor.<sup>100</sup>

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employment as a boxer for failure to prove exceptional ability, but also, for clarity, failure to obtain labor certification or a national interest waiver because letters attesting to the boxer’s character provide no proof that the boxer would make a significantly greater contribution to boxing; media coverage was unremarkable because boxing is a highly publicized sport; and asserting the boxer will promote cultural interests in boxing because the boxer is the first Ecuadorian boxer fighting for a world boxing title has no place where other high profile Hispanic boxers already compete in boxing); *The Certified Soccer Coach*, 1997 WL 33171005 (denying the petition of a soccer coach for failing to be an athlete of exceptional ability, but also for clarity, for failure to obtain labor certification or a national interest waiver above attempts by counsel to prove that letters from the Director of Coaching of a youth soccer club asserted that finding equally qualified coaches in the state would be impossible and losing the coach would be a disservice to soccer in the area; that the growth in popularity of soccer in the United States logically will produce economic benefits from further promotion of the sport through coaching; and emotional distress will be felt by the coach and his family over the denial); *The Soccer Coaching Director*, 1995 WL 1798405 (denying the petition of a director of coaching for a semi-pro and youth soccer club for failure to obtain labor certification or a national interest waiver above attempts by counsel to prove that satisfying exceptional ability is a per se satisfaction of national interest where the beneficiary will “assist with the continued development of soccer as a sport”).

<sup>96</sup> 22 I. & N. Dec. 215 (BIA 1998). “An alien cannot meet the threshold for a national interest waiver simply by establishing a certain level of training or education which could be articulated on an application for a labor certification.” *The Young Karate Instructor*, 1999 WL 33600712; *In re —*, 1998 WL 34033383 (AAU Sept. 17, 1998).

<sup>97</sup> 22 I. & N. Dec., at 217-18.

<sup>98</sup> INA § 203(b)(3), 8 U.S.C. § 1153(b)(3) (2000); see also Wiess, *supra* note 35.

<sup>99</sup> INA § 203(b)(3)(A)(i), (iii), 8 U.S.C. § 1153(b)(3)(A)(i), (iii); see *supra* notes 57-58 and accompanying text (describing labor certification).

<sup>100</sup> INA § 203(b)(3)(A)(i), (iii), 8 U.S.C. § 1153(b)(3)(A)(i), (iii).

Further, the athletes must demonstrate that the labor performed will be seasonal or temporary in nature.<sup>101</sup>

### III. U.K. IMMIGRATION

Originally, the power to control immigration in the United Kingdom derived from the royal prerogative, but the United Kingdom has controlled immigration in the modern era by statute.<sup>102</sup> The first central, codified immigration system in the United Kingdom arose to accommodate the demise of the British Empire and protect the U.K. labor market.<sup>103</sup> Due to the growth of the EU, however, the U.K. immigration system has also needed to accommodate a second set of principles that have redefined the role of immigration regulation within the United Kingdom and the EU.<sup>104</sup> This resultant duality of legislation has both limited and expanded the role and the function of the U.K. work permit system for alien athletes in the United Kingdom.<sup>105</sup>

#### A. Codification of Immigration Regulation – Immigration Act 1971

Following in the footsteps of its American counterpart, the British government codified its system of immigration regulation under the Immigration Act 1971.<sup>106</sup> The reforms proposed and passed under the Immigration Act 1971 arose in an attempt to save face amongst constituents after earlier attempts at immigration control had produced numerous ills.<sup>107</sup> With an expansive breadth, the Immigration Act 1971

<sup>101</sup> INA § 203(b)(3)(A)(i), (iii), 8 U.S.C. § 1153(b)(3)(A)(i), (iii).

<sup>102</sup> Rt. Hon. Sir Iain Glidewell, *Immigration Law and Practice in the United Kingdom*, in THE CLIFFORD CHANCE LECTURES VOLUME I: BRIDGING THE CHANNEL 193, 194 (Basil S. Markesinis ed., 1996). To invoke the “royal prerogative” meant to interpret customary law; being above the law, only the King could decide the true meaning of the law. See STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 1-28 (5th ed. 2003). Until the Glorious Revolution of 1688, the idea of legislation was outside the comprehension of anyone in the United Kingdom, instead the notion of customary law governed the legal system. *Id.* The Glorious Revolution introduced the concept of the King being below the law and that humans, in this case Parliament, could create not only *the* law but *laws*. *Id.* This distinction brought an end to the reign of customary law and introduced the modern era of legislation. *Id.*

<sup>103</sup> See *infra* Part III.A.

<sup>104</sup> See *infra* Part III.B.

<sup>105</sup> See *infra* Part III.C.

<sup>106</sup> Immigration Act, 1971, c. 77 (Eng.).

<sup>107</sup> See *supra* note 6 and accompanying text (describing the history of U.K. immigration legislation); Dummett, *supra* note 6, at 340-41. The worst debacle happened between the United Kingdom and East African Asians mainly from Kenya, who, as a result of the Work-Vouchers Act, had a right to enter the United Kingdom and were therefore expelled by the newly independent Kenyan government and the subsequent Commonwealth Immigrants

single-handedly revamped the previous dual system of commonwealth and non-commonwealth alien immigration by bringing both groups under the control of one statute and putting both groups on equal legal ground for immigration purposes.<sup>108</sup> The Immigration Act 1971 also represented efforts by the British government to protect the local labor market, as well as limit the number of unskilled workers to the point of complete abolition.<sup>109</sup>

Important to professional athletes, the Immigration Act 1971 limited all work permits to a twelve-month maximum validity and altered the disparity between aliens and Commonwealth immigrants by requiring work permits for both groups and abolishing the immigrant voucher system.<sup>110</sup> The Immigration Act 1971 also empowered the Home Secretary to make immediately effective immigration rules that

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Act 1968, which prevented any Indian-origin alien from immigrating into the United Kingdom. Dummett, *supra* note 6, at 340-41; Hansen, *supra* note 6, at 77. The eventual outcome was countless East Africans without a state to call home, and worse, without legal rights in Kenya, which resulted in destitution. Dummett, *supra* note 6, at 340-41; Hansen, *supra* note 6, at 77.

<sup>108</sup> Immigration Act, 1971, c. 77 (Eng.). The 1971 Act began with general principles addressed at delineating the place of aliens, both Commonwealth and non:

(1) All those who are in this Act expressed to have the right of abode in the [United Kingdom] shall be free to live in, and to come and go into and from, the [United Kingdom] without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

(2) Those not having that right may live, work and settle in the [United Kingdom] by permission and subject to such regulation and control of their entry into, stay in and departure from the U.K. as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall . . . be treated as having been given under this Act to those in the [UK] at its coming into force, if they are then settled there.

*Id.* § 1; see Dummett, *supra* note 6, at 342; Glidewell, *supra* note 102, at 198; Hansen, *supra* note 6, at 77-78. Prior to the Immigration Act 1971, a distinction was made between “commonwealth” aliens, aliens from states that were currently or formerly part of the British Empire, and “non-commonwealth” aliens, aliens from any other state. Dummett, *supra* note 6, at 342; Glidewell, *supra* note 102, at 198; Hansen, *supra* note 6, at 77-78. Commonwealth aliens also maintained a higher legal status than non-commonwealth aliens, for immigration and other legal purposes, thus the destruction of the distinction resounded an unheard of reform in the United Kingdom. Dummett, *supra* note 6, at 342; Glidewell, *supra* note 102, at 198; Hansen, *supra* note 6, at 77-78.

<sup>109</sup> MACDONALD, *supra* note 6, at 184. The hotel and catering industry, the hospital service, and upper-class households could not function without the help of unskilled laborers, thus the Immigration Act 1971 created a quota system limiting numbers but not abolishing entrance altogether. *Id.* These quotas were eventually phased out by the 1980s. *Id.*

<sup>110</sup> Dummett, *supra* note 6, at 342; MACDONALD, *supra* note 6, at 183.



## 572 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

described the proper administration of immigration law.<sup>111</sup> These regulations still occupy an unusual place among the British legislative scheme, for they are merely guidance rules that can be amended, disapproved, or completely revised at any moment, and the rules have no binding effect on judges.<sup>112</sup>

*B. Expansion of Citizenship – The European Economic Community*

As is common with most immigration regulation, the Immigration Act 1971 made a distinction between citizens and aliens.<sup>113</sup> When the United Kingdom assented to the Treaty of Rome in 1972,<sup>114</sup> the United Kingdom also assented to the free movement of European Community citizens within the European Economic Community (“EEC”) for labor purposes.<sup>115</sup>

Article 39 (ex 48) of the Treaty of Rome, and subsequent EU treaties, substantially altered the British immigration system.<sup>116</sup> Today, not only

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<sup>111</sup> Dummett, *supra* note 6, at 342; Glidewell, *supra* note 102, at 202-03. The Home Secretary is synonymous with the U.S. Secretary of State.

<sup>112</sup> Glidewell, *supra* note 102, at 203. These guidance rules have no binding effect because judges may strike them down as outside the power of the Immigration Act at any time. *Id.*

<sup>113</sup> Dummett, Hansen, and Glidewell all concede that the nationality issues resultant from the Immigration Act 1971, in which citizens are determined by the patrial and right of abode system, is too expansive for a discussion on immigration, and I agree. Dummett, *supra* note 6; Glidewell, *supra* note 102; Hansen, *supra* note 6. Therefore, I refer curious readers to Dummett, Hansen, and Glidewell, as well as J. EVANS, IMMIGRATION LAW (1983) and I. MACDONALD AND N. BLAKE, IMMIGRATION LAW AND PRACTICE IN THE UNITED KINGDOM (1991).

<sup>114</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

<sup>115</sup> Treaty of Rome, *supra* note 114, art. 39 (ex art. 48), 298 U.N.T.S. at 36; Glidewell, *supra* note 102, at 202; Coopers & Lybrand, *The Impact of European Union Activities on Sport*, 17 LOY. L.A. INT’L & COMP. L. REV. 245, 250-51 (1995). Aliens could still be refused admission where exclusion would be “conducive to the public good on the grounds of public policy, public security or public health.” Glidewell, *supra* note 102, at 202. The inner workings of the EEC, which has become the European Union, play a significant role in understanding how the United Kingdom must defer to the directives of the Council of Ministers, European Commission and European Parliament, however the breadth of that understanding is well beyond the scope of this project. For a quick reference, see Rachel B. Arnedt, *supra* note 3; Coopers & Lybrand, *supra*; Anne MacGregor & Gordon Blanke, *Free Movement of Persons Within the EU: Current Entitlements of EU Citizens and Third Country Nationals – A Comparative Overview*, 8(6) INT’L TRADE L. & REG. 173 (2002). The EEC, for purposes of clarification without delving too deeply into the topic, was the economic precursor to the present EU, which is the political branch of the European Community.

<sup>116</sup> See Treaty of Rome, *supra* note 114, art. 39 (ex art. 48), 298 U.N.T.S. at 36. The Treaty on European Union subsequently amended the Treaty of Rome as amended by the Treaty of Amsterdam in 1999. Article 39 of the Treaty of Amsterdam is identical to Article 48 of

are member state citizens free to move between states, but also Eastern European citizens who will be joining the EU in 2004 and possibly citizens of almost seventy Third World countries pending current litigation will be free to move between states.<sup>117</sup> Further, because the EEC was promulgated by competition law, mainly as a post-World War II attempt to prevent another German uprising, in the Treaty Establishing the European Coal and Steel Community ("ECSC"),<sup>118</sup> the ECSC, and subsequent competition law, promoted free competition in all forms of trade, including labor.<sup>119</sup>

Significant issues have developed due to the freedoms of movement and competition regarding professional athletes. Most significantly, the European Court of Justice ("ECJ") brought a decision against UEFA's "3 + 2" international player restriction rule and transfer fee system in *Union Royale Belge des Societes de Football Association ASBL v. Bosman*, because both rules came into direct conflict with the EEC's freedom of movement and protections against anti-competition practices.<sup>120</sup>

In 1990, as Jean-Marc Bosman, a Belgian soccer player, neared the end of his contract with RC Liege, the team offered Bosman a new contract, though at a fraction of his current salary.<sup>121</sup> Bosman quickly

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the Treaty of Rome, thus this Note will use the new with reference to the old so as to prevent confusion. See Amsterdam Treaty, Oct. 2, 1997, O.J. (C) 340/85.

<sup>117</sup> Robert Wagman, *Obtaining a Work Permit is Part of the Process for Americans Seeking to Play in England*, SOCCERTIMES, (Aug. 12, 2003), at [www.soccertimes.com/americans/2003/aug12.htm](http://www.soccertimes.com/americans/2003/aug12.htm) (last visited Oct. 4, 2004).

<sup>118</sup> Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 143 [hereinafter ECSC Treaty].

<sup>119</sup> Arnedt, *supra* note 3, at 1098-99.

<sup>120</sup> Case C-415/93, 1995 E.C.R. I-4921, [1995] 1 C.M.L.R. 645 (1995). Because teams in Europe are independently owned, when a player is under contract and transfers to another team, UEFA rules required the payment of a transfer fee to compensate the old team for the loss of the player. Arnedt, *supra* note 3, at 1105-06; see *supra* notes 115-19 and accompanying text (explaining the EEC freedoms of movement and anti-competition); *supra* notes 3-4 and accompanying text (explaining the role of the "3 + 2" rule).

<sup>121</sup> *Bosman*, 1995 E.C.R. I-4921 at Grounds pts. 28-29. RC Liege is a Belgian first division club and member of the Belgian soccer association, Union Royale Belge des Societes de Football Association ("URBFSA"). *Id.* at Grounds pt. 28. RC Liege placed Bosman on its transfer list, with a compensation price of over 11 million Belgian Francs. *Id.* at Grounds pt. 29. When no club showed interest in receiving Bosman in a transfer, Bosman signed a contract with U.S. Dunkerque. *Id.* at Grounds pt. 30. RC Liege, upon realization that Bosman signed a new contract, decided to receive compensation for Bosman by contracting with U.S. Dunkerque for a one year transfer, at 1.2 million Belgian Francs. *Id.* at Grounds pt. 31. To complete the transfer, RC Liege and the URBFSFA needed to send the transfer certificate to the French Football Federation before the season would begin, but RC Liege feared U.S. Dunkerque would be unable to afford the transfer fee. *Id.* at Grounds pts. 32-33. RC Liege advised the URBFSFA to withhold the certificate, essentially revoking both

refused, and after several failed attempts at contracts and transfers, he brought an action against RC Liege and URBFSa before the Belgian courts and filed an interlocutory appeal restraining RC Liege and URBFSa from preventing him from playing with another team.<sup>122</sup> Bosman later added UEFA as a party, claiming that the UEFA transfer system and the "3 + 2" rule restricted freedom of movement of players from within the European Community, because clubs with a full allotment of foreign players would only offer new contracts to domestic players, thereby violating Article 39 (ex 48) on free movement.<sup>123</sup>

Recognizing a question of European law, the Belgian Cour d'Appel requested a preliminary ruling from the ECJ.<sup>124</sup> In a monumental decision for not only soccer, but for all sports, the ECJ found that both the "3 + 2" rule and transfer fee system violated Article 39 (ex 48) on free movement because it treated nationals of member states unequally.<sup>125</sup> Further, the Commission announced that the ECJ opinion would be read to include a violation of Article 81 (ex 85)<sup>126</sup> on competition as well.<sup>127</sup> The outcome of *Bosman*, therefore, created a system in which non-EEC member alien athletes must still comply with immigration laws, as well as the "3 + 2" rule, while EEC member alien athletes do not.<sup>128</sup> Also, *Bosman* only invalidated the transfer fee requirements for players transferred who had completed their prior player contract, leaving those

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contracts, after which Bosman was suspended by RC Liege and prevented from playing during the entire season. *Id.* at Grounds pt. 33.

<sup>122</sup> *Id.* at Grounds pts. 29, 34.

<sup>123</sup> *Id.* at Grounds pts. 39-40.

<sup>124</sup> *Id.* at Grounds pt. 49; SIMON GARDINER ET AL., SPORTS LAW 364 (1998). The ECJ has the power to hear all cases that are a question of European law.

<sup>125</sup> *Bosman*, at Rulings pts. 1-3; Arndt, *supra* note 3, at 1107; Simon Gardiner & Roger Welch, 'Show Me the Money': Regulation of the Migration of Professional Sportsmen in Post-Bosman Europe, in PROFESSIONAL SPORT IN THE EU: REGULATION AND REREGULATION 107, 110 (Andrew Caiger & Simon Gardiner eds., 2000).

<sup>126</sup> Treaty of Rome, *supra* note 114, art. 81 (ex art. 85), 298 U.N.T.S. at 47. The Treaty on European Union subsequently amended the Treaty of Rome as amended by the Treaty of Amsterdam in 1999, and Article 81 of the Treaty of Amsterdam is identical to Article 85 of the Treaty of Rome, thus this Note will use the newer with reference to the older. See Amsterdam Treaty, Oct. 2, 1997, O.J. (C) 340/85.

<sup>127</sup> *Bosman*, at Rulings pts. 1-3; Arndt, *supra* note 3, at 1107; Gardiner & Welch, *supra* note 125, at 110. A violation of the freedom of movement, standing on its own, could not be enforced by the EU against UEFA because the only remedy was for Bosman the individual. Sean P. Gaffney, Note, *Free for All: The Law and Economics of Foreign Player Restrictions in European Football*, BOSTON UNIVERSITY EU LAW RESEARCH PAPER SERIES, 2002-2003, at 3, available at <http://www.bu.edu/lawlibrary/research/int/caruso/2002.htm> (last visited Oct. 4, 2004). As such, the Commission's finding of a violation of competition law empowered the EU to enforce the ruling of *Bosman* against UEFA. *Id.* at 2-3.

<sup>128</sup> Gardiner & Welch, *supra* note 125, at 116; Gaffney, *supra* note 127, at 28.

still under contract subject to the transfer fees.<sup>129</sup> After much frustration, UEFA succumbed to EEC pressures and altered its rules to comply with *Bosman*, keeping the “3 + 2” rule for non-EEC nationals, eliminating the post-contract transfer fee system, and instituting a training fee system in an effort to protect smaller clubs from the clutches of larger clubs.<sup>130</sup>

### C. *United Kingdom Immigrant Work Permit System*

The dual system of immigration for EEC and non-EEC alien athletes created in *Bosman* effected how the Immigration and Nationality Directorate (“IND”), under the auspices of the Department for Education and Employment, has implemented the U.K.’s work permit system pursuant to the Immigration Act 1971.<sup>131</sup> The purpose of the IND, set out by the Home Office, includes “[regulating] entry to and settlement in the [United Kingdom] effectively in the interests of sustainable growth and social inclusion.”<sup>132</sup> For all work permits, applicants must meet certain general criteria, such as a requirement that the employment will not displace or exclude a “resident worker,” as well as category specific criteria that aim to ensure only “essential” immigrants receive leave to enter the United Kingdom.<sup>133</sup>

<sup>129</sup> *Bosman*, 1995 E.C.R. I-4921 at Rulings pt. 1; see also Gaffney, *supra* note 127, at 17-18.

<sup>130</sup> Gaffney, *supra* note 127, at 3. UEFA did not accede to the ruling until March of 1996, and changes in the transfer system became effective in 2001. *Id.* at 17. The under-twenty-three training fee system was an attempt to compensate smaller clubs who invest time and money into grooming young players in their area and then see the players demand transfers to larger clubs who provide more potential and money. *Id.* at 17-18. A rubric was designed to calculate the cost of training and upbringing of each athlete at the time of transfer and then assessed to the receiving team. *Id.*

<sup>131</sup> THE HON. MICHAEL J. BELOFF ET AL., SPORTS LAW 90 (1999); Gardiner & Welch, *supra* note 125, at 116.

<sup>132</sup> Statement of Purpose and Aims, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/about\\_us/state\\_ment\\_of\\_purpose.html?](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/about_us/state_ment_of_purpose.html?) (last visited Oct. 4, 2004).

<sup>133</sup> Requirements for Leave to enter the United Kingdom for Work Permit Employment, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/ind/en/home/laws\\_\\_\\_policy/immigration\\_rules/part\\_5/section\\_1.html](http://www.workingintheuk.gov.uk/ind/en/home/laws___policy/immigration_rules/part_5/section_1.html) (last visited Oct. 4, 2004). Part 5 stipulates that the requirements to enter under a work permit include:

128. The requirements to be met by a person coming to the United Kingdom to seek or take employment (unless he is otherwise eligible for admission for employment under these Rules or is eligible for admission as a seaman under contract to join a ship due to leave British waters) are that he:

(i) holds a valid Home Office work permit; and  
(ii) is not of an age which puts him outside the limits for employment;  
and

576 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

1. Work Permits for Athletes

Work permits may be given to internationally established athletes “whose employment will make a significant contribution to the development of that particular sport in [the United Kingdom] at the highest level.”<sup>134</sup> To apply for a work permit, athletes must have a contract for work prepared, but their eventual employer must submit the work permit application to IND.<sup>135</sup> In addition, the employer must satisfy several criteria, which includes proving the establishment as a U.K.-based employer.<sup>136</sup>

Beginning in 1994, the Department of Employment began issuing guides which delineated the specific criteria for determining “internationally established” and “significant contribution” for professional sports in the United Kingdom.<sup>137</sup> For the 2004-2005 season,

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- (iii) is capable of undertaking the employment specified in the work permit; and
  - (iv) does not intend to take employment except as specified in his work permit; and
  - (v) is able to maintain and accommodate himself and any dependants adequately without recourse to public funds; and
  - (vi) in the case of a person in possession of a work permit which is valid for a period of 12 months or less, intends to leave the United Kingdom at the end of his approved employment.

*Id.*; see also BELOFF, *supra* note 131, at 90; General Criteria, available at [http://www.workingintheuk.gov.uk/ind/en/home/laws\\_policy/immigration\\_rules/part\\_5](http://www.workingintheuk.gov.uk/ind/en/home/laws_policy/immigration_rules/part_5) (last visited Nov. 4, 2004).

<sup>134</sup> GUIDANCE NOTES FOR EMPLOYERS ON HOW TO APPLY FOR A SPORTS AND ENTERTAINMENTS WORK PERMIT 3, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/documents/all\\_forms.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/documents/all_forms.html) (last visited Oct. 4, 2004).

<sup>135</sup> *Id.* at 2.

<sup>136</sup> *Id.* The employer may have to send information to Work Permits (United Kingdom) to prove establishment, including:

- (a) A copy of the U.K. employer’s latest audited accounts with the accountant’s name clearly shown, or a copy of the latest annual report.
  - (b) If neither of these are available, please send any other relevant documents that clearly show that you are a U.K.-based employer. For example: lease of premises, invoices, utility bills, VAT returns, accounts submitted to the Inland Revenue and the P24N1 document from the Inland Revenue.
- This is not an exhaustive list and we may need to ask for further information.

*Id.*

<sup>137</sup> BELOFF, *supra* note 131, at 90. Included in these rule guides are soccer, men’s and women’s basketball, Rugby Union, field hockey, ice hockey, baseball, boxing, lacrosse, softball, cricket, Rugby League, speedway riders, horse racing, basketball coaches, and Circle Kabaddi. Sports and Entertainers, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/)

in order to receive a work permit, a soccer player's expected employer must present two forms of objective evidence: whether the player had contributed to his national team by playing in seventy-five percent of "A" matches during the previous two years, and whether the player's national team had been aggregately ranked above seventieth place in the world ("75/70").<sup>138</sup> This rubric is intended to prove that a player is of "international distinction."<sup>139</sup> For any player injured, or even suspended, during the two-year period, evidence of the player's excused absence may be taken into account when evaluating the criteria.<sup>140</sup>

This excused absence loophole had originally been absent from the guide rules, and immigration officials drew a fine line over the seventy-five percent rule.<sup>141</sup> In *R. v. Secretary of State for Education and Employment ex parte Portsmouth Football Club Ltd.*,<sup>142</sup> the Portsmouth Football Club questioned the strict and cumbersome rule with regard to the denial of a work permit for Australian international goalkeeper Zeljko Kalac.<sup>143</sup>

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applying\_for\_a\_work/sports\_and\_ents.html (last visited Oct. 4, 2004). For a brief explanation and history of by far the most interesting work permit sport category, Circle Kabaddi, see Kabaddi, available at <http://www.goindia.go.com/sports/kabaddi/kabaddi1.htm> (last visited Oct. 4, 2004).

<sup>138</sup> *Work Permit Arrangements for Footballers 2004/2005 Season*, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/football.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/football.html) (last visited Oct. 4, 2004). An "A" match is more than just a game played by the national team, rather it is a match of international importance for a tournament or qualifying for a tournament, including:

World Cup finals game, World Cup Qualifying group game, Football Association confederation tournament game, for example: the FIFA Confederations Cup; The UEFA European Championships and Qualifiers; the African Cup of Nations and Qualifiers; the Asia Nations Cup and Qualifiers; the CONCACAF Gold cup; the CONCACAF Copa Caribe; the CONMEBOL Copa America; the OFC Nations Cup and the UNCAF Nations Cup.

*Id.* The seventieth place aggregate ranking is an average over the previous two years of a country's soccer team's ranking amongst the teams of every country in the world with a soccer team. *Id.*

<sup>139</sup> Robert Wagman, *Obtaining a Work Permit Is Part of the Process for Americans Seeking to Play in England*, SOCCERTIMES, (Aug. 12, 2003), at [www.soccertimes.com/americans/2003/aug12.htm](http://www.soccertimes.com/americans/2003/aug12.htm).

<sup>140</sup> *Work Permit Arrangements for Footballers 2004/2005 Season*, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/football.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/football.html) (last visited Oct. 4, 2004). Any time period in which the player is listed as a substitute on the roster, instead of inactive due to injury or suspension, will be considered when evaluating criteria. *Id.*

<sup>141</sup> BELOFF, *supra* note 131, at 90-91.

<sup>142</sup> Q.B. CO/2924/97 (Oct. 30, 1997) [hereinafter Portsmouth Football Club Ltd.].

<sup>143</sup> *Id.* at \*1.

## 578 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

Kalac had not played in the requisite seventy-five percent of matches over the previous two years, but this had been attested to an injury and the odd nature of Australian international soccer.<sup>144</sup> Justice McCullough held that immigration officials must weigh evidence of relevant extenuating circumstances when those circumstances prevent a player from meeting the objective criteria established by the guide rules.<sup>145</sup> McCullough saw the seventy-five percent test as a mere example of how officials can determine international ability, and although an important factor, it is not dispositive.<sup>146</sup>

## 2. Review of Work Permit Decisions

Under the Immigration Act 1971, the right of appeal extended to all aliens, and as *Portsmouth Football Club Ltd.* illustrated, athletes have the availability of questioning the legality of the work permit system.<sup>147</sup> When the issue results from the denial of a work permit, however, the Immigration Act 1971 states that alien athletes can only find a remedy through an administrative appeal.<sup>148</sup> For soccer, the IND forms an independent review board consisting of representatives of the relevant soccer governing bodies and other independent experts to prove “international distinction” to hear appeals from unfavorable decisions.<sup>149</sup> This administrative panel reviews whether the player meets the “highest caliber” and “able to contribute” standards, and then it reports to the Head of Work Permits U.K., who formally decides the appeal.<sup>150</sup> The

<sup>144</sup> *Id.* at \*2-\*3. Because Australia is geographically distant from most football competition, especially those counting towards “A” matches, the roster for any given match is typically decided by geography. *Id.* at \*2. For Kalac’s case, when Australia had played in Europe, he was in Australia and therefore did not play. *Id.*

<sup>145</sup> *Id.* at \*7.

<sup>146</sup> *Id.* McCullough’s decision also illustrated the general principle that officials, under statutory grants of power, need to consider all relevant information. BELOFF, *supra* note 131, at 91.

<sup>147</sup> Immigration Act 1971, c. 77 (Eng.); see also *supra* note 137 and accompanying text (listing the other types of athletes to which work permits apply).

<sup>148</sup> Immigration Act 1971, c. 77 (Eng.); *Work Permit Arrangements for Footballers 2004/2005 Season*, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/football.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/football.html) (last visited Oct. 4, 2004). See *infra* notes 149-51 and accompanying text (describing the forms of independent review available to athletes for soccer).

<sup>149</sup> *Work Permit Arrangements for Footballers 2004/2005 Season*, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/football.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/football.html) (last visited Oct. 4, 2004).

<sup>150</sup> *Id.*

limited review process may be exercised once per season per team, and applicants have no remedy in the court system.<sup>151</sup>

The hypothetical soccer players mentioned in the introduction all attempted to obtain U.K. work permits within the past two years.<sup>152</sup> The cases of soccer players Qu Bo, Kleberson, Tim Howard, and Bobby Convey, and their attempts to receive work permits to play in the English Premier League, illustrate how the objective tests and subjective appeals process have been implemented by the IND. Qu Bo, a Chinese international forward, received interest from Tottenham Hotspur in August of 2002, due to his strong play over the past year, but the IND denied a work permit and an appeal citing Qu's lack of requisite matches with the Chinese National Team.<sup>153</sup> Kleberson, a Brazilian international midfielder, signed with Manchester United during summer 2003 after receiving acclaim for his participation in the 2002 World Cup.<sup>154</sup> Because Kleberson had played well below the seventy-five percent threshold, Manchester United coach Sir Alex Ferguson personally attended the

<sup>151</sup> *Id.* The English soccer season runs from July 1st to May 31st. *Id.*

<sup>152</sup> See *supra* Part I.

<sup>153</sup> Qu Bo Denied English Soccer Premiership Work Permit, PEOPLE'S DAILY, (Aug. 29, 2002), available at [http://english.peopledaily.com/200208/29/eng20020829\\_102297.shtml](http://english.peopledaily.com/200208/29/eng20020829_102297.shtml). Qu had only nineteen caps when he applied for a work permit, but the speedy forward had played in all three of China's World Cup matches where he was a bright spot on a team that failed to score a goal. *China's Qu Bo Faces Heartache After Tottenham Work Permit Refused*, WORLD SOCCER NEWS.COM, (Aug. 29, 2002), available at [www.wldcup.com/news/2002Aug/20020829\\_14840\\_world\\_soccer.html](http://www.wldcup.com/news/2002Aug/20020829_14840_world_soccer.html); *Young Chinese Star Qu Impresses at Tottenham*, QINGDAO NEWS.COM, (Aug. 8, 2002), available at [http://www.qingdaonews.com/gb/content/2002-08/08/content\\_807208.htm](http://www.qingdaonews.com/gb/content/2002-08/08/content_807208.htm).

Tottenham's attention peaked because of Qu Bo's World Cup performance and because he had scored a huge goal against Argentina at the FIFA Youth World Championship in 2001. 16 Qu Bo, 2002 FIFA WORLD CUP KOREA/JAPAN, available at <http://fifaworldcup.yahoo.com/02/en/t/t/pl/181040/> (last visited Oct. 4, 2004). After a two week trial with the team in which Qu impressed many, Tottenham officials were ready to sign Qu to a player loan, pending a work permit. *Young Chinese Star Qu Impresses at Tottenham*, QINGDAO NEWS.COM, (Aug. 8, 2002); available at [http://www.qingdaonews.com/gb/content/2002-08/08/content\\_807208.htm](http://www.qingdaonews.com/gb/content/2002-08/08/content_807208.htm). Although not ready for a full transfer due to lack of experience, Tottenham was willing to pay a £150,000 fee to have Qu play for Tottenham for one year to gain experience. *China's Qu Bo not Ready for Premiership, says Hoddle*, UNITED STATES NATIONAL SOCCER PLAYERS ASSOCIATION, available at [http://www.ussoccerplayers.com/international\\_news/322036.html](http://www.ussoccerplayers.com/international_news/322036.html) (last visited Oct. 4, 2004).

<sup>154</sup> Kleberson Signs for Man Utd, BBC SPORT, (Aug. 12, 2003), available at [http://news.bbc.co.uk/sport1/hi/football/teams/m/man\\_utd/3142903.stm](http://news.bbc.co.uk/sport1/hi/football/teams/m/man_utd/3142903.stm) (last visited Oct. 4, 2004). In the 2002 World Cup, Kleberson originally came off the bench, but after playing well, was promoted to the starting lineup for the championship game against Germany. 15 - Jose Kleberson, UNITED ONLINE, available at <http://www.unitedonline.co.uk/team/profile.asp?id=44> (last visited Oct. 4, 2004).



## 580 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

subsequent appeal, where Ferguson explained his deep desire to have Kleberson join Manchester United; a work permit was granted.<sup>155</sup>

Tim Howard, an American international goalkeeper, also signed with Manchester United during summer 2003, agreeing on a lucrative deal pending approval of a work permit.<sup>156</sup> Unlike most soccer players with less than seventy-five percent participation, Howard had several ways of possibly obtaining a work permit or circumventing a work permit.<sup>157</sup> He could have, first, simply appealed the decision and presented evidence of his career both in MLS and with the National Team; second, applied for and obtained a Hungarian passport as the son of a Hungarian national, thereby circumventing the need for a work permit; third, argued that a Hungarian passport had been applied for so that the appeals board would act as if he had held one; or fourth, pled for a work permit on a "hardship" basis.<sup>158</sup> Sir Alex Ferguson again chose to

<sup>155</sup> *Kleberson Signs for Man Utd*, BBC SPORT, (Aug. 12, 2003), available at [http://news.bbc.co.uk/sport1/hi/football/teams/m/man\\_utd/3142903.stm](http://news.bbc.co.uk/sport1/hi/football/teams/m/man_utd/3142903.stm). Ferguson provided evidence of Kleberson's prowess with the World Cup champions, as a player in Brazil with Atletico Paranaense, and the circumstances behind not playing enough matches with the Brazilian National Team. *Id.* With Atletico, Kleberson had won two state championships and the national title in 2002. 15 - *Jose Kleberson*, UNITED ONLINE, available at <http://www.unitedonline.co.uk/team/profile.asp?id=44> (last visited Oct. 4, 2004); Kleberson, MANCHESTER UNITED OFFICIAL WEB SITE - CLUB & NEWS - BIOGRAPHY, available at <http://www.manutd.com/bio/bio.sps?iBiographyID=9378> (last visited Oct. 4, 2004). Kleberson's first cap came in January 2002, and since that time until his work permit application, Brazil had played in thirty-two "A" matches, which made Kleberson's participation less than fifty percent. Brazil National Team—Only "A" matches, at <http://planeta.terra.com.br/esporte/rsssfbrasil/sel/brazila.htm> (last modified Oct. 13, 2004) (providing a list of all Brazil "A" Matches).

<sup>156</sup> Grant Wahl, *Mathis Finds Form as Man Utd Plots Howard Work Permit*, SI.COM, (May 31, 2003), available at [http://sportsillustrated.cnn.com/inside\\_game/grant\\_wahl/news/2003/05/31/wahl\\_soccer/](http://sportsillustrated.cnn.com/inside_game/grant_wahl/news/2003/05/31/wahl_soccer/) (last visited Oct. 4, 2004).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; Robert Wagman, *In Tim Howard Man U Will Be Getting a Special Young Man*, MEGASOCCER.COM, (June 6, 2003), at <http://www.megasoccer.com/main/world/column/681.html> (last visited Oct. 4, 2004). Although Hungary is not part of the EU, it is an applying state, and thus Howard would automatically be able to join Manchester United without a work permit because his mother was born in Hungary. Robert Wagman, *In Tim Howard Man U Will Be Getting a Special Young Man*, Megasoccer.com, (June 6, 2003), at <http://www.megasoccer.com/main/world/column/681.html> (last visited Oct. 4, 2004); Grant Wahl, *Mathis Finds Form as Man Utd Plots Howard Work Permit*, SI.COM, (May 31, 2003), available at [http://sportsillustrated.cnn.com/inside\\_game/grant\\_wahl/news/2003/05/31/wahl\\_soccer/](http://sportsillustrated.cnn.com/inside_game/grant_wahl/news/2003/05/31/wahl_soccer/). Although Howard had applied for a Hungarian passport, obtaining one would have taken eight to ten months. Robert Wagman, *In Tim Howard Man U Will Be Getting a Special Young Man*, Megasoccer.com, (June 6, 2003), at <http://www.megasoccer.com/main/world/column/681.html>; Grant Wahl, *Mathis Finds Form as Man Utd Plots Howard Work Permit*, SI.COM, (May 31, 2003), available at [http://sportsillustrated.cnn.com/inside\\_game/grant\\_wahl/news/2003/05/31/wahl\\_soccer/](http://sportsillustrated.cnn.com/inside_game/grant_wahl/news/2003/05/31/wahl_soccer/). "Hardship" permits are

appeal and attend the hearing, offering evidence of his strong desire to obtain Howard; the work permit was granted because Howard was deemed a "player of international distinction."<sup>159</sup>

Another American international, midfielder Bobby Convey, signed with Tottenham Hotspur during summer 2003, just a few weeks after Howard, pending approval of a work permit.<sup>160</sup> Convey had sixteen caps to his name prior to filing his application, including the most out of any U.S. National Team member over the past year, yet this number fell below seventy-five percent.<sup>161</sup> In a surprising turn, especially noting Convey's career statistics in relation to Howard's, the Home Office denied Convey's work permit with a three-to-three vote because he was found to not be of "sufficiently high caliber to make an immediate

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given to players who can show that they have high paying jobs already contracted for, should the permit be granted. Robert Wagman, *In Tim Howard Man U Will Be Getting a Special Young Man*, Megasoccer.com, (June 6, 2003), at <http://www.megasoccer.com/main/world/column/681.html>.

<sup>159</sup> #14 *Tim Howard*, MANUTD ONLINE, at <http://www.manutdonline.org/team/howard.php> (last visited Oct. 4, 2004). Howard was a member of the 2000 U.S. Olympic Team in Sydney, 2001 MLS Goalkeeper of the Year, 2001 and 2003 MLS All-Star, and 2001 MLS Best XI. Gary Davidson, *Convey Returns to D.C. United After His English Work Permit Is Denied*, SOCCERTIMES, (Aug. 28, 2003), at <http://www.soccertimes.com/mls/2003/aug28.htm> (last visited Oct. 4, 2004); *Tim Howard, Goalkeeper*, SAMS-ARMY.COM, at <http://www.sams-army.com/index.php?Mlist=player&Pid=262> (last visited Oct. 4, 2004).

<sup>160</sup> Robert Wagman, *Obtaining a Work Permit Is Part of the Process for Americans Seeking to Play in England*, SOCCERTIMES, (Aug. 12, 2003), at <http://www.soccertimes.com/americans/2003/aug12.htm> (last visited Oct. 4, 2004).

<sup>161</sup> *Bobby Convey*, UNITED STATES NATIONAL SOCCER PLAYERS ASSOCIATION, available at [http://www.ussoccerplayers.com/players/bobby\\_convey/](http://www.ussoccerplayers.com/players/bobby_convey/) (last modified Sept. 9, 2004); *Bobby Convey's Petition for Work Permit Denied by England's Home Office*, OUR SPORTS CENTRAL, (Aug. 28, 2003), available at <http://www.oursportscentral.com/release.cfm?releaseid=43432>. Convey had played in one game out of twenty in 2002 and fifteen out of sixteen games in 2003. *Convey Denied Work Permit to Play in England*, UNITED STATES NATIONAL SOCCER PLAYERS ASSOCIATION, available at [http://www.ussoccerplayers.com/players/bobby\\_convey/381090.htm](http://www.ussoccerplayers.com/players/bobby_convey/381090.htm) (last visited Oct. 4, 2004). As a result, Convey appealed providing evidence of his highly-touted career, including: the youngest player acquired by MLS, youngest goal scorer in MLS history (at time of goal), four seasons played with eight goals and twelve assists, 2002 Chevy Young Male Athlete of the Year, third youngest player in National Team history to earn a full cap, *ESPN The Magazine's* "Next 2001 Athlete" for soccer, one of *World Soccer Magazine's* "Top 100 Rising Stars" in the world in 2000, captain of the U-20 National Team at the 2003 World Youth Championships, and Youngest player on 1999 FIFA U-17 World Championship team. *Bobby Convey*, UNITED STATES NATIONAL SOCCER PLAYERS ASSOCIATION, available at [http://www.ussoccerplayers.com/players/bobby\\_convey/](http://www.ussoccerplayers.com/players/bobby_convey/) (last visited Oct. 4, 2004); *Bobby Convey's Petition for Work Permit Denied by England's Home Office*, OUR SPORTS CENTRAL, (Aug. 28, 2003), available at <http://www.oursportscentral.com/release.cfm?releaseid=43432> (last visited Oct. 4, 2004).

## 582 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

impact on the British game.”<sup>162</sup> Glenn Hoddle, Tottenham head coach, called the Home Office’s decision a “massive disappointment,” and Tottenham Chairman Daniel Levy considered it an “injustice” that further proved that the work permit system needed a complete overhaul.<sup>163</sup>

## IV. ANALYSIS

Both the United States and the United Kingdom have implemented immigration controls with the intent to divorce athletes from the rest of the immigrant and nonimmigrant worker classes.<sup>164</sup> Unfortunately, these controls have led to more confusion than clarity in an industry requiring special attention in the age of globalization.<sup>165</sup> Although both states have created seemingly objective tests for determining which alien athletes deserve admission, the reality of both systems is that administrative discretion and subjectivity truly determine which athletes are admitted.<sup>166</sup> For the United States, most of the problems arise from the subjectivity of the visa evidentiary criteria and the fickleness of

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<sup>162</sup> Gary Davidson, *Convey Returns to D.C. United After His English Work Permit Is Denied*, SOCCERTIMES, (Aug. 28, 2003), at <http://www.soccertimes.com/mls/2003/aug28.htm> (last visited Oct. 4, 2004); U.S. ABROAD: *Bobby Convey Denied Work Permit*, SOCCER AMERICA.COM, (Aug. 29, 2003), at [http://www.socceramerica.com/article.asp?Art\\_ID=562133721](http://www.socceramerica.com/article.asp?Art_ID=562133721). Even though the appeals board split, 3-3, a simple majority is needed to overcome decisions of the IND. U.S. ABROAD: *Bobby Convey Denied Work Permit*, SOCCER AMERICA.COM, (Aug. 29, 2003), at [http://www.socceramerica.com/article.asp?Art\\_ID=562133721](http://www.socceramerica.com/article.asp?Art_ID=562133721).

<sup>163</sup> *Convey Decision – Chairman Thanks Fans and Calls for Overhaul of System*, TOTTENHAM HOTSPUR FC, (Aug. 31, 2003), at <http://www.spurs.co.uk/article.asp?article=161206&Title=Convey+decision+%2D+;Hoddle+Aghast+at+Convey+Knockback>, ANANOV, (Aug. 29, 2003), at [http://www.ananova.com/sport/story/sm\\_814305.html](http://www.ananova.com/sport/story/sm_814305.html). Levy stated:

I firmly believe that an injustice has been done and I urge all the bodies involved to review the system, as there are certainly several anomalies at present. This is not a question of sour grapes, simply a belief that the system must be reviewed. It is far too subjective in its current form as it literally comes down to the individual opinions of six people and as we know football is all about opinions. Set criteria have been applied in some circumstances and ignored in others. Unless the authorities, along with the Premier League and PFA come together to form a common view nothing is likely to change and that, unfortunately, is the reality of the situation.

*Convey Decision – Chairman Thanks Fans and Calls for Overhaul of System*, TOTTENHAM HOTSPUR FC, (Aug. 31, 2003), at <http://www.spurs.co.uk/article.asp?article=161206&Title=Convey+decision+%2D+>.

<sup>164</sup> See *supra* Parts II.B & III.C.1.

<sup>165</sup> See *supra* Parts II.B, III.C.2.

<sup>166</sup> See *supra* Parts II.B, III.C.2.

ALJs.<sup>167</sup> For the United Kingdom, most of the problems arise from the stringency of, and loopholes in, the eligibility criteria coupled with the subjectivity of the appeals boards.<sup>168</sup> The U.S. system can benefit from looking at both the positive and negative aspects of the U.K. model in fashioning a method of change for the flawed U.S. system so that athletes like Bobby Convey and Qu Bo can be rewarded for their talents and abilities by obtaining visas.<sup>169</sup>

#### A. *United States Problems*

The four main U.S. athlete visas, O, P, EB-1, and EB-2, in which athletes have been singled out for special consideration, have produced considerable disparities in administrative and judicial application.<sup>170</sup> Some problems result from the specific visa category and its individual requirements, but many other problems span the entire class of visas. In particular, disparities, in application of the criteria and in the analysis of evidence, retard efficiency and frustrate the purpose of the INA and regulations. If general application of the visa qualification criteria was not intended, no special treatment would have been afforded to alien athletes. As the case law has shown, both specific visa problems and general visa problems have instigated outcomes similar to Bobby Convey and Qu Bo.

#### 1. Raising the Evidentiary Burden: *The Minor League Ice Hockey Coach*

INA Section 203(b)(1)(A) grants ALJs the power to award visas to athletes who prove level of ability through recognized achievements, and CFR § 204.5(h)(3) lists the types of evidence that qualify as recognized achievements.<sup>171</sup> Satisfying these criteria should result in the awarding of a visa.

##### a. *Level of Ability*

In *The Minor League Ice Hockey Coach*, the AAU noted that the hockey coach had received the award "Minor League Pro Coach of the Year" and had led his team to win the Turner Cup, but found these awards

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<sup>167</sup> See *infra* Part IV.A.

<sup>168</sup> See *infra* Part IV.B.

<sup>169</sup> See *infra* Part IV.A-B.

<sup>170</sup> See *supra* Part II.B (listing the athlete visa decisions of the AAU, BIA, and Federal Courts); *infra* Part IV.A (providing a further analysis of the disparities resulting from administrative and judicial application).

<sup>171</sup> See *supra* notes 48-50, 53, 67, & 92 and accompanying text (explaining the statutory text and regulations).

## 584 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

unsatisfactory to meet the receipt of a one-time, internationally recognized award as indicated by the regulations.<sup>172</sup> Because both awards came from what *The Hockey News* described as a minor league, the AAU felt they would never suffice as significant awards.<sup>173</sup>

Holding athletes to such a narrow interpretation, and thus certifying only selective awards as major, internationally recognized awards, appears to follow the statutory intent.<sup>174</sup> However, by holding any award received from the minor leagues as per se deficient places an entire group of alien athletes outside of the statute while neither the INA nor the regulations have defined "major league," and the AAU has consistently applied the generic definition of major league as "league or team of principal importance in professional sports."<sup>175</sup> The IHL's role in professional hockey, as a farm system and separate league, was deliberately of principal importance to professional hockey. Therefore, creating a per se distinction based on the label of minor league is misplaced, especially considering *The A-League Soccer Player*, where the "A" League was determined a major league despite being below MLS because it too acted as both a farm system and as a separate league.<sup>176</sup>

These disparities were further exacerbated by the AAU when applying receipt of the awards to the first criterion from the regulation, which permits evidence of *lesser* nationally or internationally recognized awards.<sup>177</sup> *The Hockey News*, which awarded the Coach of the Year distinction, is a nationally recognized magazine, and the Turner Cup had been recognized as having a reputation on par with the Stanley Cup.<sup>178</sup> Thus, receipt of either honor could be a lesser nationally recognized

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<sup>172</sup> The Minor League Ice Hockey Coach, 2001 WL 34077907 at \*3 (AAU Apr. 13, 2001). The AAU explained that this factor had been established only for awards with immediate international recognition, because receipt of such an award automatically vests an athlete with a visa. *Id.*

<sup>173</sup> *Id.* *The Hockey News* is one of the leading magazines covering hockey in North America, and the AAU duly noted this distinction. *Id.*

<sup>174</sup> *Id.*; see *supra* notes 33-35 and accompanying text (describing the statutory intent behind alien athlete visas).

<sup>175</sup> The Rugby Player II, AAU WAC 01 067 53445 (AAU Jan. 30, 2003); The Rugby Player I, AAU LIN 99 083 51135 (AAU Jan. 21, 2003) (citing WEBSTER'S II NEW COLLEGE DICTIONARY (2d ed. 2001)).

<sup>176</sup> The A-League Soccer Player, AAU LIN 97 167 52173, 1997 WL 33306113 (AAU Dec. 16, 1997). The use of the past tense "was" is proper because the IHL no longer exists, not because of the level of play that would change this analysis, but because the league merged with the American Hockey League to create one large minor league farm system instead of two.

<sup>177</sup> *The Minor League Ice Hockey Coach*, 2001 WL 34077907.

<sup>178</sup> *Id.* Even the ALJ recognized this distinction in the case. *Id.*

award regardless of the minor or major league label, yet the AAU applied the same blanket distinction in dismissing all of the offered evidence.<sup>179</sup> Even though a coach may succeed to the next level, the statute and regulations merely call for recognized awards and achievements. By creating a per se distinction between minor and major leagues, the AAU has created an evidentiary burden beyond what the regulations demand and one that is in direct conflict with what the AAU has held.

*b. Extrinsic Evidence*

Similar to the evidentiary burdens described above, CFR § 204.5(h)(4) provides that other evidence may be offered to further prove extraordinary ability outside of the ten criteria.<sup>180</sup> Several key evidentiary points in *Matter of Price* were the affidavits provided by Jack Nicklaus, Lee Trevino, and several other notable golfers.<sup>181</sup> These golf legends had outstanding careers in comparison to Nick Price at the time of his visa application, and the BIA found these letters equivalent to accreditation certificates substantiating Price's credentials.<sup>182</sup> In *The Minor League Ice Hockey Coach*, however, the AAU literally brandished the hockey coach for submitting the same type of letters from Ken Hitchcock and Scotty Bowman because his coaching resumé did not measure up to Hitchcock or Bowman.<sup>183</sup> Following *The Minor League Ice Hockey Coach's* rationale, the hockey coach would have been better off having the worst NHL coach submit a letter certifying the coach's ability, even though Bowman and Hitchcock would be the two most desirable candidates to attest to the hockey coach's ability. This disparity raised the evidentiary burden well above that exacted by the regulations and contradicted a binding BIA decision; such an oversight and judicial lawmaking must be prevented.

## 2. Creating New Evidentiary Standards: Athletic Salaries

Three visas, O, EB-1, and EB-2, have criteria within their regulations pertaining specifically to salaries.<sup>184</sup> All three visa types essentially allow

<sup>179</sup> *Id.*

<sup>180</sup> See *supra* notes 66-70 and accompanying text (describing the regulations for extraordinary ability).

<sup>181</sup> 20 I. & N. Dec. 953, 955 (BIA 1994). Other affidavits came from Hale Irwin, Tom Kite, and Craig Stadler. *Id.*

<sup>182</sup> *Id.* at 955-56.

<sup>183</sup> *The Minor League Ice Hockey Coach*, 2001 WL 34077907.

<sup>184</sup> 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(8), 204.5(h)(3)(ix), 204.5(k)(3)(ii)(D) (2004); see *supra* notes 49, 67, & 92 and accompanying text (explaining the regulations for O, EB-1, and EB-2 visas).

## 586 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

alien athletes to offer proof that the athlete will “command a high salary,” and the BIA’s decision in *Grimson v. INS* controls how ALJs should interpret salaries.<sup>185</sup> The AAU has consistently found that if the alien athlete’s salary falls below that of other athletes, visas will be denied.<sup>186</sup> In *The High Ranked Tennis Player*, the AAU found the tennis player’s earnings incomparable to top names in professional tennis.<sup>187</sup> The AAU did not, however, mention whether the earnings were the exorbitantly high earnings of tennis superstars, or simply the earnings of tennis professionals of extraordinary ability. This analysis suffices if the comparison remains between like-situated athletes within the same sport. However, many of the AAU decisions simply hold athletes to a general, undefined standard of “athlete.”<sup>188</sup>

Although perplexing, the AAU has consistently held athletes to this higher evidentiary standard, except in *The Well-Paid Volleyball Coach*, in which the salary of a volleyball coach of \$30,827 was found high in relation to other volleyball coaches.<sup>189</sup> This disparity exemplifies judicial rule-making because neither the O nor the EB-2 regulations mention salaries in relation to others in the field of endeavor, whether it is the same sport or not, and neither the O nor the EB-1 regulations refer to a correlation between salary and ability.<sup>190</sup> Further, many of the salary-

<sup>185</sup> 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(8), 204.5(h)(3)(ix), 204.5(k)(3)(ii)(D); *Grimson I*, 1995 WL 134755 (N.D. Ill. 1995); see *supra* note 48 and accompanying text (explaining the regulations for O, EB-1, and EB-2 visas); see also *supra* note 81 (explaining *Grimson v. INS*, which held that salary information needed to be weighed reasonably, because superstar contracts have ballooned and the economics of sports no longer support a simple side-by-side comparison).

<sup>186</sup> See, e.g., *The Rugby Player II*, AAU WAC 01 067 53445 (AAU Jan. 30, 2003); *The Rugby Player I*, AAU LIN 99 083 51135 (AAU Jan. 21, 2003); *The Minor League Ice Hockey Coach*, 2001 WL 34077907; *The Cricket Player*, 2001 WL 34078299; *The Indian Tennis Player*, 2001 WL 34078256; *The Golf Pro Assistant*, 1998 WL 34049101; *The Field Hockey Coach I*, 1998 WL 34049092; *The Minor League Baseball Coach*, 1998 WL 34022189; *The Well-Paid Volleyball Coach*, 1998 WL 34048822; *The All-American Soccer Coach*, 1996 WL 33418610; *The Yugoslavian Soccer Coach*, 1995 WL 1797517.

<sup>187</sup> *The High-Ranked Tennis Player*, 1997 WL 33170686 (AAU July 1, 1997).

<sup>188</sup> See, e.g., *The Rugby Player II*, AAU WAC 01 067 53445; *The Rugby Player I*, AAU LIN 99 083 51135; *The Minor League Ice Hockey Coach*, 2001 WL 34077907; *The Cricket Player*, 2001 WL 34078299; *The Indian Tennis Player*, 2001 WL 34078256; *The Well-Paid Volleyball Coach*, 1998 WL 34048822; *The All-American Soccer Coach*, 1996 WL 33418610; *The Yugoslavian Soccer Coach*, 1995 WL 1797517.

<sup>189</sup> *The Well-Paid Volleyball Coach*, 1998 WL 34048822. Compare *The Well-Paid Volleyball Coach* (\$30,827), with other salaries that were deemed inadequate, *The Cricket Player*, 2001 WL 34078299 (\$35,000), *The Field Hockey Coach I*, 1998 WL 34049092 (\$2,000 per four sessions), and *The All-American Soccer Coach*, 1996 WL 33418610 (\$20,800).

<sup>190</sup> See *supra* notes 48-50, 66-70, & 90-92 and accompanying text (describing the statutory and regulatory language for O, EB-1, and EB-2 visas).

based determinations apply to sports without established professional leagues in the United States, such as cricket, field hockey, soccer, and volleyball, in which coaches typically do not command high salaries.<sup>191</sup> Although these salaries may pale in comparison to other multi-million dollar contracts, they could represent proper remuneration for a coach with extraordinary ability, such as in *The Well-Paid Volleyball Coach*.<sup>192</sup> Furthermore, salaries that may appear insufficient could represent significant remuneration in other countries due to foreign exchange rates. Simply dismissing such evidence as inadequate without justification necessitates reform.

Even worse, the AAU created a salary-based criterion for P visas in *The Rugby Player I*<sup>193</sup> and *The Rugby Player II*,<sup>194</sup> by using the rugby players' salaries as indicators of the degree of athletic competition.<sup>195</sup> Creating completely new and higher burdens of proof frustrates the purpose and intent of the visa criteria, grays the line that alien athletes must toe in order to satisfy the necessary criteria, and highlights an abuse of delegated authority by ALJs.

### 3. Disregarding Evidentiary Standards: *The Sepak Takraw Champion*

Neither the INA nor the regulations discriminate in any fashion between forms of sports, yet the AAU's apparent distaste for "new" sports illustrates a key problem within the visa system. In *The Sepak Takraw Champion*,<sup>196</sup> a significant portion of the AAU's decision hinged on the Sepak Takraw player's inability to furnish contemporaneous evidence that corroborated numerous awards and recognition.<sup>197</sup> The AAU dismissed two letters in a fashion exemplary of a dislike for the sport in general.<sup>198</sup> The AAU dismissed the first letter because the

<sup>191</sup> See *The Cricket Player*, 2001 WL 34078299 (cricket coach earning thirty-five thousand dollars); *The Field Hockey Coach I*, 1998 WL 34049092 (field hockey coach earning two thousand dollars per four sessions plus expenses); *The Well-Paid Volleyball Coach*, 1998 WL 34048822 (volleyball coach earning \$30,827); and *The All-American Soccer Coach*, 1996 WL 33418610 (soccer coach earning \$20,800).

<sup>192</sup> *The Well-Paid Volleyball Coach*, 1998 WL 34048822.

<sup>193</sup> *The Rugby Player I*, AAU LIN 99 083 51135.

<sup>194</sup> *The Rugby Player II*, AAU WAC 01 067 53445.

<sup>195</sup> *The Rugby Player II*, AAU WAC 01 067 53445; *The Rugby Player I*, AAU LIN 99 083 51135.

<sup>196</sup> *The Sepak Takraw Champion*, AAU WAC 01 242 52268, 2003 WL 2007964 (AAU Feb. 6, 2003).

<sup>197</sup> *Id.* (describing the sport of Sepak Takraw).

<sup>198</sup> *Id.* The first letter, from the captain of the USA Takraw National Team, offered proof that Sepak Takraw would be an Olympic event for the 2008 Olympics and no other person in the United States was as qualified in Sepak Takraw as a player or coach as the applicant.



likelihood of an Olympic event allowing professional players to participate was low.<sup>199</sup>

The AAU dismissed the second letter because the Chinese Sepak Takraw Association had not offered proof of interest in the tournament outside of the participants in the event, despite assertions that the Thai King's Cup was the most important international competition in the world.<sup>200</sup> The AAU essentially fashioned an interest-based criterion in disregard of those contemplated by the statute or the regulations. The statute and regulations do not only apply to players of mainstream, U.S.-based sports, but rather to any athlete who has reached the very top of his or her field of endeavor.<sup>201</sup> Compared with *The Field Hockey Coach I* and *The Well-Paid Volleyball Coach*, the Sepak Takraw champion's successes and abilities clearly warranted the granting of a visa.<sup>202</sup> The AAU's focus on the level of interest for the sport, with clear disregard for the accomplishments of the applicant, contradicted the existence and purpose of the criteria; administrative activism of this sort should not continue.

#### 4. Inapplicable Criteria

Not all the blame for the problems within the U.S. immigration system can be assigned to ALJs because Congress, the DHS, and the Department of Justice oversee the performance of the immigration system. In the Immigration Act of 1990, Congress made a conscious effort to carve out specific categories of visas for athletes, and the CFR has provided a list of criteria that ALJs apply to determine if these athlete-specific categories have been met.<sup>203</sup> However, when the admission of an athlete depends upon satisfying a finite number of criteria, and these criteria can never be satisfied or too many people can satisfy the criteria, the evidentiary burden on the applicant rises unjustly.

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*Id.* The second letter, from the Chinese Sepak Takraw Association, attested to the applicant's coaching of the gold medal team at the Thai King's Cup World Sepak Takraw Championship. *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See *supra* notes 48-50, 66-70 and accompanying text (describing the statutory and regulatory language for O and EB-1 visas).

<sup>202</sup> *The Field Hockey Coach II*, AAU LIN 97 176 50350, 1998 WL 34049093 (AAU Aug. 13, 1998); *The Well-Paid Volleyball Coach*, AAU LIN 97 209 50724, 1998 WL 34048822 (AAU June 25, 1998).

<sup>203</sup> See *supra* notes 33-35 and accompanying text (listing and explaining the new visa categories created by the Immigration Act of 1990).

For example, O, EB-1, and EB-2 visas can be granted by offering proof of membership in professional associations, however professional associations in professional athletics occupy a unique place within each sport.<sup>204</sup> Some professional associations are the only available association for a sport, others are mandatory associations for licensing or union purposes, and still others are open to all enthusiasts regardless of participation in the sport.<sup>205</sup> In all three categories, membership is inherently meaningless because only one association exists, all members must join, or any person can join, respectively. In any event, the AAU has created a per se bar to satisfaction.

For sports with only one professional association, the bar exists because the regulations call for "associations" in the plural instead of "association(s);" where only one association exists, the "associations" criterion would never be met.<sup>206</sup> Mandatory associations would be inherently meaningless as a method for discriminating between average athletes and extraordinary or exceptional athletes because every athlete would satisfy the criteria, and thus not indicate any true level of ability.<sup>207</sup> Associations open to participants and enthusiasts, regardless of occupation or achievement, could never be considered professional because individuals would not only be on a par with others in the profession but also with people who did not even maintain that occupation.<sup>208</sup> The intent of the regulations, to provide ALJs with a rubric to determine whether the visa categories had been met, is undermined when no athlete can satisfy the requirements. Although EB-

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<sup>204</sup> 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(2), 204.5(h)(3)(ii), 204.5(k)(3)(ii)(E) (2004).

<sup>205</sup> See, e.g., *The Young Karate Instructor*, AAU WAC 98 040 53186, 1999 WL 33600712 (AAU Mar. 30, 1999) (holding membership in organization does not elevate individuals above others in field); *The Safety Certified Volleyball Coach*, 1998 WL 34022283 (AAU Sept. 17, 1998) (finding only available association was USA Gymnastics); *The Boxer*, AAU EAC 98 075 54714, 1998 WL 34022273 (AAU Sept. 16, 1998) (holding mandatory boxing association membership for licensing purposes); *The Certified Soccer Coach*, 1997 WL 33171005 (AAU Nov. 19, 1997) (holding international governing association not a professional association if membership is open to public); *The Yugoslavian Soccer Coach*, AAU LIN 94 082 50371, 1995 WL 1797517 (AAU Oct. 30, 1995) (finding no evidence that membership required outstanding achievement).

<sup>206</sup> See, e.g., *The Safety Certified Volleyball Coach*, 1998 WL 34022283 (finding only available association was USA Gymnastics).

<sup>207</sup> See, e.g., *The Boxer*, 1998 WL 34022273 (holding mandatory boxing association membership for licensing purposes).

<sup>208</sup> See, e.g., *The Young Karate Instructor*, 1999 WL 33600712 (holding membership in organization does not elevate individuals above others in field); *The Certified Soccer Coach*, 1997 WL 33171005 (holding international governing association not a professional association if membership is open to public); *The Yugoslavian Soccer Coach*, 1995 WL 1797517 (finding no evidence that membership required outstanding achievement).

## 590 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

1 and EB-2 visas are applicable to industries outside of sports and entertainment, O visas were specifically drafted with athletes in mind.<sup>209</sup> In any of these categories, however, creating such criteria superficially inflates the possible methods of evidence while unjustly increasing the burden of proof.

The professional association element is not the only inapplicable criterion. O visas permit two forms of evidence of scholarly work, but, whereas the similar EB-1 category mentions scholarly work of “athletic” contribution, the O visa criteria merely permits contribution or authorship without any “athletic” connotation.<sup>210</sup> Again, O visas were specifically formulated for athletes, yet “athletics” remains absent from the criteria.<sup>211</sup> Furthermore, sportspeople typically do not compose or provide scholarly contributions to their sports, and even when they do, as in *The Italian Soccer Coach*, the AAU holds the production to a high standard.<sup>212</sup> From these two examples, three out of the eight criteria would not apply to an athlete for an O visa, but the athlete must still meet three of the remaining five elements to satisfy the evidentiary burden.<sup>213</sup> This same sort of restriction on the number of criteria needed to satisfy the evidentiary burden occurs in the EB-1 and EB-2 categories.<sup>214</sup> The inherent problem in inapplicable criteria can be rectified by reforming the regulations that provide ALJs with the evidentiary standards in determining admission of alien athletes.

<sup>209</sup> See *supra* notes 48-50 and accompanying text (describing the intent of the O visa).

<sup>210</sup> 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(5)-(6), 204.5(h)(3)(iv) (2004).

<sup>211</sup> See *supra* notes 48-50 (describing the purpose and criteria for O visas).

<sup>212</sup> *The Italian Soccer Coach*, EAC 02 259 51763 (AAU Feb. 27, 2003) (denying O visa to a soccer coach who had written the highest selling soccer manual in Italy because it was not evident that the manual was published in a professional journal or other major media).

<sup>213</sup> 8 C.F.R. § 214.2(o)(3)(iii)(B).

<sup>214</sup> Taking into account these two examples and the inapplicability of the art-based criteria of evidence of work at exhibitions and commercial success in performing arts, EB-1 applicants must satisfy three out of the remaining six. *Id.* § 204.5(h)(3). Even more difficult would be the burden on certain EB-2 applicants, the supposedly easier standard than EB-1, who must satisfy three of three elements because most sports do not provide or require official academic records or licenses/certifications, and ALJs have been reluctant to define athletic licenses as satisfying the criterion. *Id.* § 204.5(k)(3)(ii)(A), (C); see also *The English Soccer Coach*, LIN 95 245 50293, 1998 WL 34048826 (AAU June 26, 1998); *The Brazilian Soccer Coach*, 1998 WL 2027170 (AAU May 14, 1998); *The Certified Soccer Coach*, 1997 WL 33171005 (AAU Nov. 19, 1997); *The Yugoslavian Soccer Coach*, AAU LIN 94 082 50371, 1995 WL 1797517 (AAU Oct. 30, 1995) (illustrating cases where coaches’ licenses or certifications were summarily inadequate).

*B. United Kingdom Problems*

The U.K. work permit system, like the United States, also has problems with disparities. Unlike the United States, the United Kingdom established its work permit system to run efficiently, using objective standards to expedite granting work permits to satisfactory applicants.<sup>215</sup> The criteria, however, have proven tenuous and arbitrary in implementation, and review of work permit applications has created loopholes in the objectivity.<sup>216</sup> The crux of the criticism comes from loopholes in the system and the appeals process for work permits, which a large number of alien athletes have been relegated to conquer. As the EU expands, and EU treaties emerge, loopholes will become more prevalent and criticism will rise. By delineating the problems of the U.K. work permit system, through application of prior cases and hypothetical cases, how reform should occur in the United States will become more evident.

## 1. Objective Criteria Problems

*a. The IND Criteria and the Objectivity Loophole*

The criteria established by the IND for all alien athletes are intended to permit only the best athletes into the British sports industry.<sup>217</sup> To ensure this, the IND's criteria are set high to cull out almost every possible alien athlete besides those of international distinction.<sup>218</sup> For example, in soccer, the key criteria are seventy-five percent participation and seventieth place, regardless of talent or ability.<sup>219</sup> A brief facial examination, however, leads to a wholly different conclusion. Take, for example, two nations near the seventieth place threshold, New Zealand and Canada.<sup>220</sup> Every single player on the Canadian team would be ineligible to play in the U.K. regardless of number of games played, because Canada was ranked seventy-seventh for the two-year period from December 2001 to November 2003.<sup>221</sup> For New Zealand, every

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<sup>215</sup> See *supra* Part III.C.

<sup>216</sup> See *infra* Part IV.B.

<sup>217</sup> See *supra* notes 132, 134 and accompanying text (explaining the intent of the IND criteria).

<sup>218</sup> See *supra* notes 132, 134 and accompanying text (explaining the intent of the IND criteria).

<sup>219</sup> See *supra* notes 138-39 and accompanying text (listing the criteria for soccer players for 2004-2005).

<sup>220</sup> See *supra* note 138 and accompanying text (explaining the role of the two-year aggregate FIFA ranking system).

<sup>221</sup> FIFA Rankings, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_en](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_en)

## 592 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

player playing in the requisite seventy-five percent would have automatically earned a work permit, because New Zealand was ranked sixty-fourth.<sup>222</sup>

Furthermore, New Zealand's location in the world forces its National Team to maintain a match format similar to Australia's.<sup>223</sup> Following the holding in *Portsmouth Football Club Ltd.*, the seventy-five percent threshold does not require universal application in instances such as New Zealand's.<sup>224</sup> Thus, numerous New Zealanders could receive work permits while playing well below seventy-five percent because of a loophole in the objectivity of the criterion. Could a Canadian player bring suit charging the FIFA ranking system of improperly ranking the teams of the world, and thereby allow the appeals board some leeway in implementing that criterion? U.S. reformers should recognize that developing loopholes in the system compromised the objectivity of the work permit criteria. The purpose of hard-and-fast rules is to efficiently determine who satisfies the criteria and who does not. By allowing loopholes, the purpose of the system is undermined.

Conversely, putting all claims of hardship and subjectivity aside, the intent of the objective standards and work permits in general was to protect the U.K. labor market and only permit the absolute best workers from obtaining British employment.<sup>225</sup> This intent seems constrained

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ts/criteria/football/fifa\_rankings.html? (last visited Oct. 5, 2004). See *supra* note 138 and accompanying text (explaining FIFA's ranking system and the role it plays in the IND criteria). Under the FIFA rankings for October 2002 through September 2004, Canada is aggregately ranked 85th, while New Zealand is ranked 74th. *FIFA Rankings*, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/football/fifa\\_rankings.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/football/fifa_rankings.html)? (last visited Oct. 5, 2004). Although this slightly moots the hypothetical posed above, it is just as easy for one or both of these teams to move back into the top seventy in the rankings, thereby making this hypothetical a useful tool for analyzing the U.K. work permit system as a whole.

<sup>222</sup> *FIFA Rankings*, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/football/fifa\\_rankings.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/football/fifa_rankings.html)? (last visited Oct. 5, 2004); see *supra* note 138 and accompanying text (explaining FIFA's ranking system and the role it plays in the IND criteria).

<sup>223</sup> See *supra* notes 143-44 and accompanying text (describing the odd Australian National Team soccer system).

<sup>224</sup> *Portsmouth Football Club Ltd.*, *supra* note 142; see *supra* notes 145-46 and accompanying text (providing Justice McCullough's reasoning behind *Portsmouth Football Club Ltd.*).

<sup>225</sup> See *supra* notes 132, 134 and accompanying text (illustrating the intent behind requiring work permits).

when, for example, the Rugby Union and soccer criteria apply to almost every division in both professional industries.<sup>226</sup> Incorporating terms of U.S. immigration policy, a distinction must be made between major and minor leagues.<sup>227</sup> Essentially, objective standards need to apply in conjunction with the visa category and the athletes presumed to qualify for each visa, instead of blanket standards for every possible professional league of a sport.

*b. EEC Nationals, Bosman, and the Passport Loophole*

The Treaty of Rome, subsequent measures adopted by the EU, and the *Bosman* decision further illustrate how loopholes can weaken objective criteria. The freedoms of movement and anti-competition have been a blessing for European economies and have been a model for globalization.<sup>228</sup> The narrow holding of *Bosman*, however, which maintained the player quota and player transfer fee systems for non-EEC nationals, created a loophole that completely compromised the purpose of the 75/70 rule altogether.<sup>229</sup>

Many non-EEC aliens have resorted to obtaining passports from other EEC states as an escape from applying for a work permit, because several EEC states have lenient standards for who may obtain a passport.<sup>230</sup> Tim Howard had applied for a Hungarian passport and

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<sup>226</sup> Rugby Union Criteria for 2004/2005 Season, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/rugby\\_union.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/rugby_union.html)? (last visited Oct. 4, 2004). The Rugby Union criteria apply to any individual seeking employment in the Premiership in England, the pro-teams and Premier Division 1 in Scotland, and the Premiership to League Division 7 in Wales. *Id.* The soccer criteria apply to any individual seeking employment in the EPL and Divisions 1 to 3 in England, the Scottish Premier League and Divisions 1 to 3 in Scotland, the Leagues of Wales, and the Irish Football League of Northern Ireland. *Work Permit Arrangements for Footballers 2004/2005 Season*, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/football.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/football.html) (last visited Oct. 4, 2004). This list includes 163 soccer teams.

<sup>227</sup> See *supra* Part IV.A.1.a (discussing the minor league, major league dichotomy).

<sup>228</sup> See *supra* notes 115-19 and accompanying text (explaining the role of the EU Constitution and Articles 48 and 85 dealing with free movement of labor and anti-competition).

<sup>229</sup> *Union Royale Belge Des Societes De Football Ass'n v. Bosman*, 1 C.M.L.R. 645 (Belg. 1995); see *supra* notes 125-29 and accompanying text (describing the limited holding of *Bosman*).

<sup>230</sup> Robert Wagman, *Convey Permit Rejection Leads to Calls for Change*, SOCCERTIMES, (Sept. 4, 2003), at <http://www.soccertimes.com/wagman/2003/sep04.htm>; Robert Wagman, *Obtaining a Work Permit Is Part of the Process for Americans Seeking to Play in England*, SOCCERTIMES, (Aug. 12, 2003), at <http://www.soccertimes.com/americans/2003/aug12.htm> (last visited Oct. 4, 2004).

## 594 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

would have received one because his mother was born in Hungary.<sup>231</sup> Danny Karbasiyoon, a nineteen-year-old American whose mother is Italian, followed the same route to land with Arsenal of the English Premier League in August of 2003.<sup>232</sup> This gaping loophole has exacerbated the problem of justifying the objective standards of the IND criteria. Although Karbasiyoon represents the future of U.S. soccer, his career pales in comparison with Bobby Convey.<sup>233</sup> Again, U.S. reformers should note that the goal of creating objective criteria, to promote and protect the U.K. soccer industry by prohibiting immigration of all athletes except the very few at the top, has been frustrated by loopholes formed outside the control of the United Kingdom.

## 2. Subjective Review Problems—Manchester United v. Tottenham Hotspur

Beyond the objective criteria, administrative agencies exert considerable discretion in determining which alien athletes receive a work permit, and this subjective review can create problems when too much discretion is given to the agencies. Manchester United and head coach Sir Alex Ferguson spent considerable time before the soccer review panels formed by the IND to review the pending work permits of Tim Howard and Kleberson.<sup>234</sup> At both hearings, Ferguson made it clear that he desired both players for the upcoming season, and Sir Alex's wishes were granted.<sup>235</sup> Glenn Hoddle, the former head coach at Tottenham,

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<sup>231</sup> See Robert Wagman, *Convey Permit Rejection Leads to Calls for Change*, SOCCERTIMES, (Sept. 4, 2003), at <http://www.soccertimes.com/wagman/2003/sep04.htm>; Robert Wagman, *Obtaining a Work Permit is Part of the Process for Americans Seeking to Play in England*, SOCCERTIMES, (Aug. 12, 2003), at <http://www.soccertimes.com/americans/2003/aug12.htm> (last visited Oct. 4, 2004).

<sup>232</sup> Robert Wagman, *Convey Permit Rejection Leads to Calls for Change*, SOCCERTIMES, (Sept. 4, 2003), at <http://www.soccertimes.com/wagman/2003/sep04.htm>.

<sup>233</sup> Robert Ziegler, *Virginia Player Headed to Arsenal*, TOP DRAWER SOCCER, (Jan. 11, 2003), at <http://www.topdrawersoccer.com/NextStep/1042297216/view>. Karbasiyoon was signed by Arsenal after an impressive showing at the Adidas Elite Soccer Program during the summer of 2002, but he had not played for MLS, and only sparingly for the U-18 Men's National Team. *Id.*

<sup>234</sup> See *supra* notes 155, 158-59 and accompanying text (describing how Ferguson appealed Kleberson and Tim Howard's cases).

<sup>235</sup> See *supra* notes 155, 158-59 and accompanying text (describing how Ferguson appealed Kleberson and Tim Howard's cases).

also spent time before the review panels for Qu Bo and Bobby Convey, yet both times he left without the player he had coveted.<sup>236</sup>

Many in soccer have argued that the denial of Bobby Convey's work permit in the face of the granting of Tim Howard's occurred out of favoritism for Manchester.<sup>237</sup> The IND criteria state that work permits not meeting the 75/70 threshold will be reviewed to find international distinction by looking for players with high caliber ability who can contribute to the world of English soccer.<sup>238</sup> Without definition or interpretation, these standards seem as amorphous as "extraordinary" and "exceptional" ability, leaving plenty of discretion to the review panels. In the press release for Bobby Convey's denial, however, the IND admitted to holding Convey to the seemingly higher burden of proof of "immediate impact on the British game."<sup>239</sup> Any changes in the U.S. visa system should avoid granting broader subjectivity which frustrates the purpose of formulating criteria to guide administrative agencies. Permitting managers or panelists to exert their intentions and opinions into the decision does not alter the caliber of a player's ability, or protect the quality of play within the MLS or any other sport league throughout the United States. It only calls for a reform of the system.

Misapplication of the criteria and of the appeals also occurred in Qu Bo's case. The IND had denied Qu Bo's original application because he failed to meet the seventy-five percent threshold.<sup>240</sup> In its appellate decision, however, the IND cited Qu Bo's lack of experience with the Chinese National Team for the denial of the work permit. The review

<sup>236</sup> See *supra* notes 153, 161-62 and accompanying text (describing how Hoddle appealed Qu Bo and Bobby Convey's cases). Tottenham, of course, is no Man. U., with the Spurs consistently placing in the middle to upper half of the EPL.

<sup>237</sup> *Convey Decision – Chairman Thanks Fans and Calls for Overhaul of System*, TOTTENHAM HOTSPUR FC, (Aug. 31, 2003), at [www.spurs.co.uk/article.asp?article=161206&Title=Convey+decision+%2D+;Hoddle+Aghast+at+Convey+Knockback](http://www.spurs.co.uk/article.asp?article=161206&Title=Convey+decision+%2D+;Hoddle+Aghast+at+Convey+Knockback), ANANOVA, (Aug. 29, 2003), at [http://www.ananova.com/sports/story/sm\\_814305.html](http://www.ananova.com/sports/story/sm_814305.html); Robert Wagman, *Convey Permit Rejection Leads to Calls for Change*, SOCCERTIMES, (Sept. 4, 2003), at <http://www.soccertimes.com/wagman/2003/sep04.htm>; see also *supra* note 163 and accompanying text (giving the response to Bobby Convey's denial and the subsequent criticism of the work permit system by Tottenham Chairman Levy and Coach Hoddle).

<sup>238</sup> *Work Permit Arrangements for Footballers 2004/2005 Season*, WORKING IN THE UK, available at [http://www.workingintheuk.gov.uk/working\\_in\\_the\\_uk/en/homepage/work\\_permits/applying\\_for\\_a\\_work/sports\\_and\\_ents/criteria/football.html](http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/work_permits/applying_for_a_work/sports_and_ents/criteria/football.html) (last visited Oct. 4, 2004). See also *supra* Part III.C.1.

<sup>239</sup> Gary Davidson, *Convey Returns to D.C. United after his English Work Permit is Denied*, SOCCERTIMES, (Aug. 28, 2003), at <http://www.soccertimes.com/mls/2003/aug28.htm>; U.S. ABROAD: *Bobby Convey Denied Work Permit*, SOCCER AMERICA.COM, (Aug. 29, 2003), at [http://www.socceramerica.com/article.asp?Art\\_ID=562133721](http://www.socceramerica.com/article.asp?Art_ID=562133721).

<sup>240</sup> See *supra* note 153 and accompanying text (explaining Qu Bo's case).



panel supposedly should weigh evidence to find players of the “highest caliber” who will be “able to contribute” to the English game.<sup>241</sup> The seventy-five percent level logically should be absent from that determination; instead, the review panels should look to the performance of each player to determine his ability and the subsequent use of that ability in the United Kingdom. Citing lack of experience merely repeats what is already known, this player does not meet the objective criteria. Using the objective criteria as the base for the subjective analysis holds applicants to an overly burdensome degree of proof that may keep elite players out while other loopholes exist to let in lesser players.

#### V. PROPOSED AMENDMENTS TO THE CFR AND JUDICIAL INTERPRETATION

The U.S. and U.K. immigration systems were, in part, a conscious attempt to control the globalization of sports. The U.K. model openly attempted to foster British sports, most specifically rugby and soccer. The resulting system of protection, however, has done little to maintain any elite level of skill or ability throughout the entire industry, especially soccer. The EPL, considered by many as one of the best soccer leagues in the world, has faltered under the strict system of protectionism implemented by the British government because of loopholes in the objective standards and overbroad discretion in the review panels.

The U.S. model, too, can trace its flaws to the purpose and application of the immigration system. The problems with the U.S. system lie with the ALJs and Directors who have consistently misapplied the many criteria for the several visas. If the purpose of the immigration system was to create only an elite level of professional athletic leagues, regulation of alien athletes would be minimal or nonexistent, yet many qualified athletes have been left without the opportunity to peddle their craft in the United States. Although many U.S. professional sports leagues are considered among the world’s best, many others remain significantly lackluster despite the age of globalization. In order for the U.S. system to better foster these new genres of sport, as well as maintain a high level of performance in its established professional leagues, the legislation and regulations must change.

If the purpose of the immigration system was to protect the U.S. labor market of professional athletes, which was the proffered rationale

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<sup>241</sup> See *supra* notes 149-51 and accompanying text (providing an explanation of the work permit review panel process).

behind the INA, a more stringent immigration system would have to be implemented, which also has not occurred.<sup>242</sup> Disparities in both purposes signal a need for reform in the U.S. immigration system, however neither purpose has taken root as the principal purpose behind immigration controls of alien athletes. Therefore, taking into account the benefits and detriments of the current U.S. visa system and the U.K. work permit system, alteration of the regulations and the interpretations of those regulations should attempt to foster a singular purpose for regulating alien athletes by adequately limiting improper adjudication as well as the number of cases requiring adjudication altogether.

*A. Amendments to O Visas*

Although intended to apply to scholars, businesspeople, and athletes alike, the regulations for O visas have consistently produced disparities in application. Therefore, the entire regulation itself requires reformation, as do the interpretations of the new regulation. However, because some of the elements of the former regulation were properly addressed to alien athletes, their place and interpretation within the regulation have not been disturbed.

*8 C.F.R. § 214.2(o)(3)(vi) Evidentiary criteria for an O-1 alien of extraordinary ability in the field of athletics. An alien of extraordinary ability in the field of athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:*

*(A) Receipt of nationally or internationally recognized prizes or awards for individual athletic excellence in the field of endeavor, such as Player of the Year or its equivalent; or*

*(B) At least three of the following forms of documentation:*

*(1) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field;*

*(2) Documentation of the alien's attainment of nationally or internationally recognized status for athletic expertise in the field of endeavor, as judged by recognized national or international experts in their disciplines or fields;*

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<sup>242</sup> See *supra* note 19 and accompanying text (describing the intent behind the INA).

*(3) Documentation of the alien's membership in associations, or association in fields that have only one such group, in the field for which classification is sought, which require outstanding achievements of the alien, as judged by recognized national or international experts in their disciplines or fields;*

*(4) Published material in professional or major trade publications or major media about the alien's extraordinary ability, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;*

*(5) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;*

*(6) Evidence of the alien's original scientific, scholarly, business-related, or athletic contributions of major significance in the field;*

*(7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;*

*(8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence, in reasonable relation to others in the field.*

*(C) If the criteria in paragraph (o)(3)(vi) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.<sup>243</sup>*

#### Commentary

Section (vi). By creating an athlete-exclusive category for the regulations, judicial application can focus on the ability of the athlete in regards to the specific sport and not the interpretation of the factors. As a result, applicants will be aware of the requirements for proof, and the

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<sup>243</sup> The proposed amendments are italicized and are the contribution of the author.

adjudication process can become more efficient. Although creating an athlete-specific category would appear to create a distinction between the O visa extraordinary ability and EB-1 visa extraordinary ability, setting them apart merely recognizes that the EB-1 visa regulation has already been equipped with a broader scope while the O visa regulation requires more precise attention. The O visa regulation already possesses a similar distinction, with aliens of extraordinary ability in the arts and extraordinary ability in the motion picture or television industry having their own subsets under O while remaining under the general EB-1 regulation, and adjudicators have not had considerable problems divorcing these subsets.<sup>244</sup>

Section (vi)(A). This objective criterion should be read as a standard for individual achievements only, as extraordinary ability should be found in the individual alien and not from a team accomplishment. A non-exclusive list of proper awards would include individual Olympic medals, individual World Championships, league specific honors such as Most Valuable Player or Best XI, and notable league records. The prior criterion, by limiting the scope of one time international award to receipt of the Nobel Peace Prize or an Olympic medal, possessed an underinclusive interpretation, because professional athletes generally cannot participate in the Olympics and many other notable awards may only have national acclaim but not international acclaim. Limiting the scope of an objective factor in this fashion would be proper, but the prior criterion, by calling for individual achievement yet allowing team awards, such as Olympic medals, also possessed an overinclusive interpretation because receipt of a team award may or may not have been due to the extraordinary ability of the individual alien. This team award loophole contravened the purpose of objective standards implemented to compensate athletes for their extraordinary ability as individuals, while also casting doubt as to what constituted a one time international award under the regulation. Instead of fostering a hard-and-fast rule for extraordinary ability, this loophole would encourage applicants to offer arguments in support of awards that the regulation did not intend to recognize as per se distinctions of extraordinary ability. Therefore, a more defined and stringent criterion is necessary to permit adjudicators to efficiently award visas to athletes satisfying the criterion. Although this objective standard leaves out numerous awards of honor and distinction, specifically team based awards, it will further the intent and purpose of restrictive, objective regulation while eliminating the possibility of crippling loopholes.

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<sup>244</sup> 8 C.F.R. § 214.2(o)(3)(iv), (v) (2004).

## 600 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

Section (vi)(B)(1).<sup>245</sup> This criterion merely alters the former § 214.2(o)(3)(iii)(B)(1) factor by including the “lesser” function seen in EB-1.<sup>246</sup> “Lesser” is required because § 214.2(vi)(A) has been broadened to include national awards, while the absence of “individual” opens the criterion to more possible evidence. Included in this criterion would be any individual or team accomplishment awarded for excellence in a major league sport. “Major” league shall be defined by the governing body of the respective sport. By restricting awards to those received for excellence in major league sports as defined by the governing body, less subjective interpretation will be required of the adjudicators, thus reducing the possibility of improper adjudication. A non-exclusive list of proper awards would be league championships, team Olympic medals, team World Championships, and all-star berths. Although receipt of a “lesser” team award may derive more acclaim than an individual award that satisfies § 214.2(vi)(A), team accomplishments are only the subjective result of an individual, and inclusion of this team accomplishment with the objective criterion would create a loophole compromising objectivity. Therefore, such awards properly belong within the subjective factors.

Section (vi)(B)(2). The addition of this factor demonstrates the need to recognize the certification and the unawarded accomplishments of athletes. This factor would include evidence of the attainment of the highest level of certification or license within the sport, supported by the attestation of experts that the certification or license rewards extraordinary ability, and the process results from either accomplishment in the field or a structured regimen not available to the general public. Setting this requirement at the highest level of certification or license rewards those athletes who have commanded the highest rank of their sport, impliedly extraordinary ability, while prohibiting lesser qualified applicants, as well as certification and licensing that is not awarded due to extraordinary ability. Also included in this criterion would be evidence of reasonable statistical hallmarks of expertise recorded commonly by the sport and recognized by the governing body of the sport and experts in the field as marks signifying extraordinary ability, such as scoring marks, number of wins, and participation in championship-caliber competition. Permitting evidence of statistical hallmarks recognizes the existence of levels of merit that do

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<sup>245</sup> See *id.* § 214.2(o)(3)(iii)(B)(1).

<sup>246</sup> *Id.* § 204.5(h)(3)(i).

not receive awards that would satisfy § 214.2(vi)(A), yet indicate extraordinary ability.

Section (vi)(B)(3).<sup>247</sup> This section is an active recognition of the peculiarities of sports for professional associations, and in this section, the focus is on the requirements for participation on the alien instead of on the number of associations of which an individual athlete is a member. This criterion also accounts for the existence of professional associations that permit membership by the general public, but also contain members that hold higher positions that cannot be attained by simply joining the association. Focusing the attention on the individual athlete fosters the intent and purpose behind the statute to admit only extraordinarily-abled athletes due to their individual accomplishments. Outstanding achievement of the alien may be either in obtaining membership in the association or as a requirement of membership. Limiting accreditation to experts in the field again reduces the possibility of improper adjudication.

Section (vi)(B)(4).<sup>248</sup> Published material may take many forms, and as such, the slight amendment to this factor provides the adjudicator with more definition and the applicant with more notice as to what evidence will satisfy the requirement, thereby rectifying the reoccurring problem of the parade of press releases.

Section (vi)(B)(5).<sup>249</sup> [No changes in either text or application].

Section (vi)(B)(6).<sup>250</sup> This factor is a combination of the two prior scholarly-based O visa criteria, because authorship of scholarly materials in athletics rarely occurs, and if it does, should only be considered if the authorship contributes to the athlete's sport. Also, this element requires the addition of an athletic-specific element because any contribution by an athlete could inherently encompass athletics, while other contributions could also still exist.

Section (vi)(B)(7).<sup>251</sup> [No changes in either text or application].

Section (vi)(B)(8).<sup>252</sup> The alteration of this criterion is intended to codify the consistently unapplied holding of *Grimson v. INS*, in which the

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<sup>247</sup> See *id.* § 214.2(o)(3)(iii)(B)(2).

<sup>248</sup> See *id.* § 214.2(o)(3)(iii)(B)(3).

<sup>249</sup> See *id.* § 214.2(o)(3)(iii)(B)(4).

<sup>250</sup> See *id.* § 214.2(o)(3)(iii)(B)(5)-(6).

<sup>251</sup> See *id.* § 214.2(o)(3)(iii)(B)(7).

<sup>252</sup> See *id.* § 214.2(o)(3)(iii)(B)(8).

602 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

economics of professional sports must be weighed reasonably and within the specific sport for which classification is sought by the adjudicator, regardless of popularity or market share of the league within the United States.<sup>253</sup>

Section (vi)(C).<sup>254</sup> The change in this section is an interpretational change, which states that where appropriate, the adjudicator must recognize the existence of sports that may not have domestic United States popularity but may have such international popularity that the sport and its athletes of extraordinary ability merit admission to continue performance. Also, the adjudicator must, where appropriate, recognize the evidentiary benefits of peer reviews not as a means of comparison but rather as for the truth of the matter asserted, a recognition similar to the factors set forth in § 214.2(p)(4)(ii)(B)(2)(iv) and (v).<sup>255</sup>

B. Amendments to P Visas

P visas have been adequately gauged for athlete-specific application, and therefore only minor changes need to be implemented.

8 C.F.R. § 214.2(p)(4)(ii)(B)(2)(i) *Evidence of having participated to a significant extent in a prior season with a major United States sports league, or an international equivalent major sports league;*

...

(3) *If the criteria in paragraph (p)(4)(ii)(B)(2) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.*

Commentary

Section 214.2(p)(4)(ii)(B)(2)(i) should be amended to include “or an international equivalent major sports league.”<sup>256</sup> This change removes the U.S.-centric strain by appreciating the viability of other major sports leagues throughout the world amidst the globalization of sport. “Major”

<sup>253</sup> Grimson I, 1995 WL 134755 (N.D. Ill. Mar. 27, 1995); see also *supra* notes 74-75 and accompanying text (discussing the holding of *Grimson I*); *supra* Part IV.A.2 (illustrating the misapplied holding).

<sup>254</sup> See 8 C.F.R. § 214.2(o)(3)(iii)(C).

<sup>255</sup> See *id.* § 214.2(p)(4)(ii)(B)(2)(iv), (v).

<sup>256</sup> See *id.* § 214.2(p)(4)(ii)(B)(2)(i).

league, as well as “international equivalent,” should be defined by the appropriate governing body of the specific sport, just as in the O visa regulation.<sup>257</sup> Furthermore, the addition of § 214.2(p)(4)(ii)(B)(3), mirroring that of § 214.2(o)(3)(vi)(C), recognizes the existence of non-American sports while the viability of peer reviews has already been addressed in § 214.2(p)(4)(ii)(B)(2)(iv) and (v).<sup>258</sup>

C. *Amendments to EB-1 Visas*

As mentioned, the changes to the O visa regulation were not intended to create a new visa category, but rather to merely clarify the disparities that resulted from application of the regulation. Therefore, minor changes to create symmetry between the O visa regulation and the EB-1 visa regulation are required, and all relevant interpretations shall also apply.

*8 C.F.R. § 204.5(h)(3) Initial Evidence . . . Such evidence shall include evidence of receipt of nationally or internationally recognized prizes or awards for individual athletic excellence in the field of endeavor, such as Player of the Year or its equivalent; or at least three of the following:*

*(h)(3)(ii) [Interpretational change only.]*

*(h)(3)(ii) Documentation of the alien's membership in associations, or association in fields that have only one such group, in the field for which classification is sought, which require outstanding achievements of the alien, as judged by recognized national or international experts in their disciplines or fields;*

*(h)(3)(iii) Published material in professional or major trade publications or major media about the alien's extraordinary ability, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;*

*(h)(3)(iv) [No changes in either text or application.]*

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<sup>257</sup> See *supra* Part V.A.

<sup>258</sup> See *supra* Part V.A (discussing § 214.2(p)(4)(ii)(B)(2)(i)); 8 C.F.R. § 214.2(p)(4)(ii)(B)(2)(iv), (v) (2004).



604 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 39]

*(h)(3)(v) Evidence of the alien's original scientific, scholarly, business-related, or athletic contributions of major significance in the field;*

*(h)(3)(vi) [Renumbered only.]*

*(h)(3)(vii) [Renumbered only.]*

*(h)(3)(viii) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence, in reasonable relation to others in the field;*

*(h)(3)(ix) [Renumbered only.]*

*(h)(3)(x) Documentation of the alien's attainment of nationally or internationally recognized status for athletic expertise in the field of endeavor, as judged by recognized national or international experts in their disciplines or fields;*

*(h)(4) [Interpretational change only.]*

Commentary

First, "individual" must be inserted into § 204.5(h)(3) to make § 204.5(h)(3) mirror § 214.2(o)(3)(vi)(A) as a recognition of extraordinary ability in the athlete and not in the team.<sup>259</sup> Second, the interpretation of lesser recognized awards for § 204.5(h)(3)(i) must be adopted.<sup>260</sup> Third, the singular association element and outstanding achievement of the individual alien requirement for § 204.5(h)(3)(ii) must be inserted. Fourth, the media attention criterion that provides the athlete with more notice as to what qualifies as published material relating to the athlete's work must be altered.<sup>261</sup> Fifth, the contribution and authorship factors must be combined into one criterion like § 214.2(o)(3)(vi)(B)(6).<sup>262</sup> Sixth, "reasonable" must be inserted into § 204.5(h)(3)(viii).<sup>263</sup> Seventh, the

<sup>259</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(A)); see 8 C.F.R. § 204.5(h)(3).

<sup>260</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(B)(1)); see 8 C.F.R. § 204.5(h)(3)(i).

<sup>261</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(bi)(B)(4)); see 8 C.F.R. § 204.5(h)(3)(iii).

<sup>262</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(B)(6)); see 8 C.F.R. § 204.5(h)(3)(v), (vi).

<sup>263</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(B)(8)); see 8 C.F.R. § 204.5(h)(3)(ix).

2004] *Extraordinary Ability and Immigration* 605

new expertise-based factor must be created.<sup>264</sup> Lastly, the comparable evidence interpretation for § 204.5(h)(4) must be adopted.<sup>265</sup>

*D. Amendments to EB-2 Visas*

The EB-2 visa has also been adequately composed so as to require only minor alteration.

*8 C.F.R. § 204.5(k)(3)(ii)(D) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence, in reasonable relation to others in the field;*

*(k)(3)(iii) [Interpretational change only.]*

*Commentary*

First, Section 204.5(k)(3)(ii)(A) should be interpreted to include the highest level of certification or licensing of professional athletes, similar to the interpretation for § 214.2(o)(3)(vi)(B)(2), where the licensing or certification is not necessary to practice the profession, as recognized by § 204.5(k)(3)(ii)(C).<sup>266</sup> Almost all sporting events do not require licenses or certifications to practice because the licenses or certifications are merely gradations of ability, with the lowest level participant typically performing in the profession without any license or certification. This change would not include too many possible applicants because the “similar award” would be of the highest level only, inherently rewarding the sheer absence of any other form of degree available for that class of aliens. Second, to support symmetry, “reasonable” should be inserted into the salary criterion, as noted in the O and EB-1 visas, as well as the singular association element.<sup>267</sup> Lastly, the comparable evidence interpretation for § 204.5(k)(3)(iii) should be adopted.<sup>268</sup>

<sup>264</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(B)(2)).

<sup>265</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(C)); see 8 C.F.R. § 204.5(h)(4).

<sup>266</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(B)(2)); see 8 C.F.R. § 204.5(k)(3)(ii)(A), (C).

<sup>267</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(B)(3),(8)); see 8 C.F.R. § 204.5(k)(3)(ii)(D), (E).

<sup>268</sup> See *supra* Part V.A. (discussing § 214.2(o)(3)(vi)(C)); see 8 C.F.R. § 204.5(k)(3)(iii).

## VI. CONCLUSION

The United States has implemented its immigration system to limit the number of aliens admitted into the United States. This Note has illustrated that due to the globalization of sports, the U.S. immigration system, as applied to athletes, has flaws that must be altered to accommodate the ever-shrinking world of professional sports. Further, the problems arising from these flaws have been intensified through adjudicatory misapplication and decision-making. In order to devise a uniform purpose and implementation of immigration regulation, however, this Note has forecasted that the necessary reforms in the U.S. immigration system must foster efficiency while also limiting admission to only a select class of alien athletes. By comparing the methods of administrative discretion documented in the U.K. immigration system, which resulted in the stratified grants and denials of visas to the "soccer prospects," with the disparities present in the administration of the U.S. immigration system by ALJs, this Note has suggested means of reforming U.S. regulation of alien athletes by focusing on strict objective standards and precise subjective elements. Adoption of these reforms should strike a balance between protecting U.S. labor and fostering high competition in professional sports. Adoption will create a modern immigration system based on efficiency, predictability, and decisiveness allowing alien athletes, such as the "soccer prospects," the clearest opportunity to present a case in support of receiving a visa into the United States.

**Kevin K. McCormick\***

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